

**INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES**

**PNG Sustainable Development Program Ltd.**

**v.**

**Independent State of Papua New Guinea**

**(ICSID Case No. ARB/13/33)**

---

**DECISION ON THE CLAIMANT'S REQUEST FOR PROVISIONAL MEASURES**

Gary Born, President of the Tribunal  
Duncan Kerr, Arbitrator  
Michael Pryles, Arbitrator

*Secretary of the Tribunal*  
Monty Taylor

*Assistant to the Tribunal*  
Valeriya Kirsey

---

Date of dispatch to the Parties: 21 January 2015

Decision on the Claimant's Request for Provisional Measures

**TABLE OF CONTENTS**

<b>I. INTRODUCTION.....</b>	<b>2</b>
<b>II. THE PARTIES .....</b>	<b>2</b>
A. The Claimant .....	2
B. The Respondent.....	2
<b>III. PROCEDURAL HISTORY .....</b>	<b>2</b>
<b>IV. FACTUAL BACKGROUND .....</b>	<b>5</b>
<b>V. PARTIES' SUBMISSIONS .....</b>	<b>11</b>
A. The Claimant's Request for Provisional Measures .....	11
B. The Respondent's Observations on the Claimant's Request for Provisional Measures.....	16
C. The Claimant's Reply on Provisional Measures .....	24
D. Parties' Correspondence Relating to Provisional Measures Post-Dating the Claimant's Reply.....	30
<b>VI. THE TRIBUNAL'S REASONS.....</b>	<b>39</b>
A. The Tribunal's Power to Grant Provisional Measures and Applicable Standard.....	39
1. Tribunal's Power to Recommend Provisional Measures .....	40
2. Standard for Granting Provisional Measures .....	42
B. The Claimant's Requested Provisional Measures .....	48
1. Claimant's Request No. 1.....	48
2. Claimant's Request No. 2.....	52
3. Claimant's Request No. 3.....	56
C. Relevance of the Singapore Court Proceedings .....	61
<b>VII. THE TRIBUNAL'S DECISION .....</b>	<b>62</b>

Decision on the Claimant's Request for Provisional Measures

**I. INTRODUCTION**

1. This Decision sets out the Tribunal's reasons and the Tribunal's decision on the Claimant's Request for Provisional Measures dated 14 July 2014 ("Claimant's Request for Provisional Measures").

**II. THE PARTIES**

*A. The Claimant*

2. PNG Sustainable Development Program Ltd., the Claimant (also referred to as "PNGSDP"), is a company limited by guarantee and incorporated under the laws of Singapore. The Claimant is represented in this arbitration by Mr Nish Shetty, Mr Paul Sandosham, Ms Joan Lim, Mr Matthew Brown and Ms Yvette Anthony of Clifford Chance Pte. Ltd., Mr Audley Sheppard of Clifford Chance LLP, and Dr Romesh Weeramantry and Dr Sam Luttrell of Clifford Chance.<sup>1</sup>

*B. The Respondent*

3. The Independent State of Papua New Guinea, the Respondent (also referred to as "PNG"), is represented in this arbitration by Mr Alvin Yeo SC, Ms Joy Tan, Ms Swee Yen Koh, Ms Wendy Lin, Mr Jared Chen, Mr Yin Juon Qiang, Ms Monica WY Chong, and Mr Ahmad Firdaus bin Daud of WongPartnership LLP.

**III. PROCEDURAL HISTORY**

4. On 17 October 2013, the Claimant filed a request for arbitration dated 10 October 2013 against the Respondent (the "Request for Arbitration") with the International Centre for Settlement of Investment Disputes ("ICSID").

---

<sup>1</sup> Professor James Crawford also appeared as the Claimant's counsel at the Hearing on Jurisdiction held in Singapore on 29-30 November 2014.

Decision on the Claimant's Request for Provisional Measures

5. On 20 December 2013, the Secretary-General of ICSID registered the Request for Arbitration, as supplemented by the Claimant's letters of 8 November, 22 November, and 10 December 2013, in accordance with Article 36 of the ICSID Convention and so notified the Parties. In the Notice of Registration, the Secretary-General invited the Parties to proceed to constitute an arbitral tribunal as soon as possible in accordance with Articles 37 to 40 of the ICSID Convention.
6. On 20 February 2014, the Claimant informed ICSID that it opted for the formula provided by Article 37(2)(b) of the ICSID Convention for the method of constituting the arbitral tribunal.
7. In the result, the Tribunal was composed of Mr Gary Born, a national of the United States of the America, President, appointed by agreement of the Parties; Dr Michael Pryles, a national of Australia, appointed by the Claimant; and the Honourable Justice Duncan Kerr, Chev LH, a national of Australia, appointed by the Respondent.
8. On 17 June 2014, the Secretary-General, in accordance with Rule 6 of the ICSID Rules of Procedure for Arbitration Proceedings ("ICSID Arbitration Rules"), notified the Parties that all three arbitrators had accepted their appointments and that the Tribunal was therefore deemed to have been constituted on that date. Mr Monty Taylor, ICSID Legal Counsel, was designated to serve as Secretary of the Tribunal.
9. On 14 July 2014, the Claimant submitted its Request for Provisional Measures, together with: (a) a witness statement of Sir Mekere Morauta dated 14 July 2014; and (b) accompanying factual and legal exhibits. By letter dated 16 July 2014, the Respondent provided some comments on the Claimant's Request for Provisional Measures. The Claimant replied by letter dated 18 July 2014.
10. The first session of the Tribunal was held by telephone conference-call on 25 July 2014. The Tribunal subsequently issued its Procedural Order No. 1 on 7 August 2014.

Decision on the Claimant's Request for Provisional Measures

11. In accordance with the Tribunal's Procedural Order No. 1, on 1 August 2014 the Respondent filed its Observations on Claimant's Request for Provisional Measures ("Respondent's Observations") together with a witness statement of Mr Daniel Rolpagarea dated 1 August 2014 and accompanying factual exhibits and legal materials.
12. On 12 August 2014, the Claimant requested a one-day extension to file its Reply Observations on Provisional Measures ("Claimant's Reply"), which were due to be filed that day under the terms of the Tribunal's Procedural Order No. 1. This request was granted by the Tribunal on 12 August 2014.
13. In accordance with the revised procedural timetable, the Claimant's Reply was filed on 13 August 2014, together with an unsigned witness statement of Sir Mekere Morauta and accompanying factual and legal exhibits. The Claimant subsequently filed a signed version of Sir Mekere Morauta's witness statement on 14 August 2014.
14. By emails dated 28 August and 1 September 2014, the Claimant and the Respondent respectively confirmed their agreement to have the Claimant's Request for Provisional Measures determined on the papers without oral argument.
15. A hearing on the Respondent's Preliminary Objections under Rule 41(5) of the ICSID Arbitration Rules dated 16 July 2014 took place at Maxwell Chambers in Singapore on 10 October 2014. The Tribunal's Decision on those objections was issued to the Parties on 28 October 2014.
16. On 14 October 2014, the Claimant sent a letter to the Tribunal providing additional information (and accompanying documentation) in support of the Request for Provisional Measures. The Respondent responded to the Claimant's letter on 24 October 2014.
17. The Claimant sent a further letter in support of the Request for Provisional Measures on 6 November 2014, together with accompanying documentation. The Respondent replied to this letter on 27 November 2014.

Decision on the Claimant's Request for Provisional Measures

18. The hearing on jurisdiction was held in Singapore on 29-30 November 2014.
19. On 23 December 2014, the Claimant sent an additional letter to the Tribunal concerning the Request for Provisional Measures.
20. On the same day, the Tribunal directed the Respondent to comment on the Claimant's letter by no later than 30 December 2014.
21. On 29 December 2014, the Respondent wrote to the Tribunal to request an extension for filing its response to the Claimant's 23 December letter in the week of 5 January 2015.
22. On the same day, the Tribunal granted the Respondent's extension request.
23. On 9 January 2015, the Respondent sent its response to the Claimant's 23 December letter.
24. On 14 January 2015, the Claimant sent an unsolicited letter in response to the Respondent's 9 January letter. On 20 January 2015, the Respondent sent an unsolicited response to the Claimant's 14 January letter.

**IV. FACTUAL BACKGROUND**

25. For the purposes of this Decision on Provisional Measures, and for that limited purpose only, the Tribunal briefly summarises the facts as alleged in the Claimant's Request for Arbitration and Request for Provisional Measures. The following summary of alleged facts does not constitute a finding by the Tribunal (either provisional or final) on any facts disputed by the Parties, and does not pre-judge any issues in dispute in this case.
26. This proceeding concerns the Claimant's alleged investment in an open pit copper and gold mine in the Star Mountains of the Western Province of PNG (the "Ok Tedi mine"). As set out in the Request for Arbitration, PNGSDP owns a majority shareholding (*i.e.*, 63.4146%) in Ok Tedi Mining Ltd ("OTML"), a PNG-incorporated company.<sup>2</sup> OTML's

---

<sup>2</sup> Request for Arbitration, at para. 16.

Decision on the Claimant's Request for Provisional Measures

rights to mine Ok Tedi are set out in Special Mining Lease No. 1.<sup>3</sup> The Special Mining Lease No. 1 is the primary asset of OTML.<sup>4</sup>

27. The Request for Arbitration provides details on the history of the Ok Tedi mine and on how the Claimant was incorporated and came to own its shares in OTML.<sup>5</sup> These facts are summarised below, to the extent relevant for this Decision on Provisional Measures.
28. The Claimant was incorporated in Singapore on 20 October 2001.<sup>6</sup> It is a company limited by guarantee (as distinguished from share capital) and governed by its Memorandum and Articles of Association (the "Memorandum and Articles of Association" or "M&A").<sup>7</sup> The M&A annex a set of Program Rules (the "Program Rules") which primarily deal with how earnings are to be applied for the purposes of fund management, transparency and accountability.<sup>8</sup>
29. In 2001, BHP Minerals Holdings Pty Ltd ("BHP," a subsidiary of BHP Billiton Ltd), the former shareholder and operator of OTML, transferred all of its ordinary shares in OTML to the Claimant.<sup>9</sup> This transfer was intended to entrust an independent, foreign-registered company with the management of the development of the Ok Tedi mine (through OTML), and for that company to use the mine's earnings to promote sustainable development within PNG and advance the general welfare of the people of PNG, particularly those of the Western Province where the Ok Tedi mine is located.<sup>10</sup> In connection with the transfer, a charge was created over the Claimant's shares in OTML, by way of a Security Deed dated 7 February 2002 and a Security Trust Deed dated 7

---

<sup>3</sup> Request for Arbitration, at para. 25.

<sup>4</sup> Request for Arbitration, at para. 25.

<sup>5</sup> Request for Arbitration, at paras. 9-15.

<sup>6</sup> Request for Arbitration, at para. 18.

<sup>7</sup> Request for Arbitration, at para. 18.

<sup>8</sup> Request for Arbitration, at para. 18.

<sup>9</sup> Request for Arbitration, at para. 14.

<sup>10</sup> Request for Arbitration, at paras. 13-14.

Decision on the Claimant's Request for Provisional Measures

February 2002, and a mortgage was created over the Claimant's shares in OTML, by way of an Equitable Mortgage of Shares dated 7 February 2002.<sup>11</sup>

30. Following a selective share buyback conducted in January 2011, the Claimant and the Respondent have respectively held 63.4146% and 36.5853% of issued ordinary shares in OTML.<sup>12</sup> According to the Claimant, the Claimant carries significant risk as a shareholder in OTML due to, *inter alia*, its undertaking to take over BHP's liabilities in respect of the mining activities (and its broader obligations as a shareholder), and indemnities that the Claimant granted in respect of environmental claims and claims arising out of BHP's stewardship of OTML.<sup>13</sup>
31. The Claimant also asserts that, since its incorporation in 2001, it has financed and overseen at least USD 500 million dollars worth of development and environmental projects.<sup>14</sup> It has financed these projects, and carried out the functions for which it was established, by taking its annual dividends from OTML and (in accordance with the Program Rules) putting them into low-risk investments in international markets to establish two funds: a short-term fund and a long-term fund.<sup>15</sup>
32. In these proceedings, the Claimant asserts that the Respondent, through its instrumentalities and entities for which it is responsible, has mounted a concerted campaign against the Claimant and its investments, culminating in the cancellation of the Claimant's shares in OTML.<sup>16</sup> In particular, on 19 September 2013, the Respondent enacted the Mining (Ok Tedi Tenth Supplemental Agreement) Act 2013 (the "Tenth Supplemental Act"), along with the Mining (Ok Tedi Mine Continuation) (Ninth Supplemental Agreement) (Amendment) Act 2013.<sup>17</sup> According to the Claimant, among

---

<sup>11</sup> Request for Arbitration, at para. 14.

<sup>12</sup> Request for Arbitration, at para. 15.

<sup>13</sup> Request for Arbitration, at para. 19.

<sup>14</sup> Request for Arbitration, at para. 20.

<sup>15</sup> Request for Arbitration, at para. 20.

<sup>16</sup> Request for Arbitration, at para. 24.

<sup>17</sup> Request for Arbitration, at para. 35.

Decision on the Claimant's Request for Provisional Measures

other things, the Tenth Supplemental Act “purported to ‘cancel’ [the Claimant’s] shares in OTML and reissue them to the State.”<sup>18</sup>

33. Section 4 of the Tenth Supplemental Act provides, in relevant part, as follows:

4. *Shareholders of OTML*

(1) *On the coming into operation of this Act –*

(a) *all ordinary shares held by PNGSDP in the share capital of OTML shall be cancelled and cease to exist; and*

(b) *122,200,000 new, fully paid ordinary shares in the share capital of OTML free of any encumbrance, charge or equitable interest shall be issued to the State.*<sup>19</sup>

34. Sections 4(5) and 4(6) of the Tenth Supplemental Act also provide:

(5) *All references to PNGSDP in the constitution of OTML and in the Fifth Restated Shareholders Agreement shall, on and from the coming into operation of this Act, be read and construed as a reference to the State.*

(6) *On and from the coming into operation of this Act, the Charge is void and of no legal effect and shall not create any interest of any nature whatsoever in any share of OTML.*<sup>20</sup>

35. Section 6 of the Tenth Supplemental Act provides:

*Notwithstanding anything to the contrary in any Act, the State has all necessary powers to restructure PNGSDP and its operations to ensure that PNGSDP applies its funds for the exclusive benefit of the people of the Western Province.*<sup>21</sup>

---

<sup>18</sup> Claimant's Request for Provisional Measures, at para. 4. *See also* Request for Arbitration, at para. 36.

<sup>19</sup> Request for Arbitration, at para. 36.

<sup>20</sup> Request for Arbitration, at para. 39. “Charge” is defined in the Tenth Supplemental Act to mean “the Equitable Mortgage of Shares agreement between PNGSDP and Insinger Trust (Singapore) Limited dated 7 February 2002 as amended from time to time” (Request for Arbitration, at para. 39 fn. 31).

<sup>21</sup> Request for Arbitration, at para. 40.

Decision on the Claimant's Request for Provisional Measures

36. In its Request for Arbitration, the Claimant claims that the enactment of the Tenth Supplemental Act amounts to a breach of applicable prohibitions against unlawful expropriation of the Claimant's property.<sup>22</sup> The Claimant further claims that the conduct of the Respondent has amounted to violations of other guarantees and standards of treatment that must be accorded by the Respondent to foreign investors, including (i) the fair and equitable treatment standard; (ii) guarantee of free repatriation of returns on investments; (iii) specific undertakings given to the Claimant (i.e., the umbrella clause); (iv) the full protection and security standard; (v) the rule against arbitrary, discriminatory or unreasonable measures; (vi) national treatment guarantee; and (vii) the rule of free entry and sojourn of personnel.<sup>23</sup>
37. According to the Claimant, the primary relief that it seeks in this arbitration is "the reinstatement of its shares in OTML, so that it can continue to use its earnings from the Mine to perform the sustainable development and general welfare functions for which it was established."<sup>24</sup> However, because "there exists overwhelming evidence that the State is determined to destroy (or at least paralyse) PNGSDP and prevent it pursuing this claim," provisional measures "are necessary to prevent the State from achieving these objectives."<sup>25</sup>
38. In its Request for Provisional Measures, the Claimant lists a series of actions purportedly taken by the Respondent against the Claimant or its property since the Request for Arbitration was filed. According to the Claimant, the Respondent has:
- a. "purported to exercise long-arm powers to terminate all members of the Claimant's Board of Directors (and appoint a 'Transitional Management Team' of its own choosing);"<sup>26</sup>

---

<sup>22</sup> Request for Arbitration, at para. 54.

<sup>23</sup> Request for Arbitration, at para. 55.

<sup>24</sup> Claimant's Request for Provisional Measures, at para. 6.

<sup>25</sup> Claimant's Request for Provisional Measures, at para. 6.

<sup>26</sup> Claimant's Request for Provisional Measures, at paras. 7(a), 9.

Decision on the Claimant's Request for Provisional Measures

- b. "taken steps to seize certain of the Claimant's assets in Western Province and, through the direct actions of its Prime Minister, freeze the Claimant's bank accounts in PNG;"<sup>27</sup>
  - c. "used its influence to deprive the Claimant of access to its accounts offshore;"<sup>28</sup>
  - d. "threatened the Claimant's officers and employees with arrest and criminal prosecution;"<sup>29</sup> and
  - e. "deported the Claimant's Communications and Media Manager, Mr Mark Davis."<sup>30</sup>
39. The Claimant also alleges that there are local court proceedings pending in Singapore that were commenced at the time the constitution of the Tribunal was pending, and that relate to matters of Singapore company law.<sup>31</sup> The developments before the Singapore courts are discussed below, to the extent relevant to this Decision.
40. The above facts are discussed in more detail in the Witness Statements of Sir Mekere Morauta<sup>32</sup> and Mr Daniel Rolpagarea.<sup>33</sup> The Tribunal does not detail these facts here, but

---

<sup>27</sup> Claimant's Request for Provisional Measures, at paras. 7(b), 8.

<sup>28</sup> Claimant's Request for Provisional Measures, at paras. 7(c), 8. In particular, the Claimant asserts that the Respondent "instructed the [PNG Internal Revenue Commission] to deny the Claimant tax clearance," without which "the Claimant will not be able to remit monies from its local account (which receives returns on its investments, such as repayments on loans) to its operations account in Hong Kong (which the State has tried unsuccessfully to freeze)." Claimant's Request for Provisional Measures, at para. 8.

<sup>29</sup> Claimant's Request for Provisional Measures, at paras. 7(d), 10. In this regard, the Claimant adds that "on or around 12 May 2014, the State also announced its intention to set up a 'Commission of Inquiry' to investigate PNGSDP's asset sales, its company structure and the management of its finances." Claimant's Request for Provisional Measures, at para. 10.

<sup>30</sup> Claimant's Request for Provisional Measures, at para. 7(e).

<sup>31</sup> Claimant's Request for Provisional Measures, at para. 9.

<sup>32</sup> See 1st Sir Mekere Morauta WS, at pp. 33-52. In its Request for Provisional Measures, the Claimant states that "Sir Mekere's Witness Statement provides further background to this dispute, a detailed account of the State's attacks on PNGSDP and an explanation of what is likely to happen if the provisional measures the Claimant seeks are not granted by the Tribunal"; and "details of the relevant facts and measures of the Respondent are set out in Sir Mekere's Witness Statement." Claimant's Request for Provisional Measures, at paras. 2, 26. See also 2nd Sir Mekere Morauta WS, at pp. 9-18.

<sup>33</sup> See 1st Daniel Rolpagarea WS, at pp. 25-59.

Decision on the Claimant's Request for Provisional Measures

discusses certain facts described in these Witness Statements where relevant in its Decision below.

**V. PARTIES' SUBMISSIONS**

*A. The Claimant's Request for Provisional Measures*

41. In its Request for Provisional Measures, the Claimant states that it “urgently requires provisional measures to: (a) prevent the continuation of oppressive and unlawful conduct by [the Respondent]; (b) maintain the *status quo*; and (c) avoid further aggravation of this dispute pending its final determination by the Tribunal.”<sup>34</sup>
42. The Claimant argues that “there exists overwhelming evidence that the State is determined to destroy (or at least paralyse) [the Claimant] and prevent it pursuing this claim,” and “[p]rovisional measures are necessary to prevent the State from achieving those objectives.”<sup>35</sup> According to the Claimant, the Respondent has recently committed “act[s] of aggravation,” including:
- a. the Respondent’s “attempts to freeze the Claimant’s accounts;”<sup>36</sup>
  - b. the Respondent “is *escalating* its attempts to starve the Claimant of the capital it needs to continue operating” and has recently given instruction to the PNG Internal Revenue Commission to deny the Claimant tax clearance;<sup>37</sup>
  - c. “the Respondent’s long-arm attempts to replace the management of PNGSDP are clearly acts of aggravation as they are exacerbating this dispute and making the just resolution of it significantly more difficult” and they also “pose a direct threat to the Claimant’s ability to continue operating and to pursue its claims.”<sup>38</sup> The Claimant contends that it brought the proceedings in the High Court of Singapore

---

<sup>34</sup> Claimant’s Request for Provisional Measures, at para. 1.

<sup>35</sup> Claimant’s Request for Provisional Measures, at para. 6.

<sup>36</sup> Claimant’s Request for Provisional Measures, at para. 8.

<sup>37</sup> Claimant’s Request for Provisional Measures, at para. 8 (emphasis in original).

<sup>38</sup> Claimant’s Request for Provisional Measures, at para. 9.

Decision on the Claimant's Request for Provisional Measures

“to try to preserve its ability to manage itself in Singapore in accordance with its Memorandum and Articles of Association, free from long-arm interference by the State;”<sup>39</sup> and

d. “there is strong reason to believe that the State directed persons for whom it is responsible to make threats of physical harm to officers, employees and agents of [the Claimant], or at the very least failed to prevent these persons from making such threats,” which amount to “acts of aggravation of the most serious kind.”<sup>40</sup>

43. The Claimant alleges that it has asked the Respondent “to maintain the *status quo* and not aggravate this dispute pending its resolution in accordance with the ICSID Convention;” however, the Respondent has instead “*accelerated* its campaign against [the Claimant] and its investments, taking an array of actions that can only be described as predatory.”<sup>41</sup>

44. The Claimant asserts that the Tribunal’s “power to order provisional measures derives from Article 47 of the ICSID Convention and Rule 39 of the ICSID Arbitration Rules,” and that “[i]t is generally accepted that these provisions grant wide discretion to the Tribunal.”<sup>42</sup> The Claimant states that, in order to prevail on an application for provisional measures under Article 47 of the ICSID Convention, “the requesting party bears the burden of establishing that the Tribunal has *prima facie* jurisdiction ... , that there is a *prima facie* basis to its claim ... , and that the requested measures are necessary,” and that party “must specify the ‘rights to be preserved’.”<sup>43</sup>

45. Regarding the Tribunal’s jurisdiction, the Claimant states that “when a request for provisional measures is made before jurisdiction is finally determined,” the party requesting provisional measures “does not need to establish jurisdiction in any definitive

---

<sup>39</sup> Claimant’s Request for Provisional Measures, at para. 9.

<sup>40</sup> Claimant’s Request for Provisional Measures, at para. 10.

<sup>41</sup> Claimant’s Request for Provisional Measures, at para. 26 (emphasis in original).

<sup>42</sup> Claimant’s Request for Provisional Measures, at para. 12.

<sup>43</sup> Claimant’s Request for Provisional Measures, at para. 13.

Decision on the Claimant's Request for Provisional Measures

sense” but must demonstrate that there is “the *prima facie* existence of jurisdiction, or, to couch this in negative terms, the absence of a clear lack of jurisdiction.”<sup>44</sup>

46. Regarding the standard of harm that is applicable in this context, the Claimant notes that “ICSID tribunals tend to require a showing of harm that is either ‘substantial’ or ‘irreparable’.”<sup>45</sup> The Claimant suggests that the harm would be “irreparable” where “if it was allowed to materialise, [it would] be incapable of being cured through an award of money damages.”<sup>46</sup> According to the Claimant, irreparable harm would result where the actions in question, “if not restrained by provisional measures, [would] effectively bring an end to the investor’s business,” even if “the loss could (at least in theory) be measured in money.”<sup>47</sup>

47. Applying the above test to this case, the Claimant argues that:

- a. the Claimant’s rights which “fall for final adjudication in the merits of this case”<sup>48</sup> and which need to be preserved include:
  - i. “its right to operate its investments and deal with its assets (including its bank accounts wherever located) in accordance with the Program Rules;”<sup>49</sup>
  - ii. “its right to be treated and dealt with by PNG in accordance with the standards of treatment prescribed by the [PNG Investment Promotion Act 1992 (“IPA”)] and the BITs to which the Respondent is a party;”<sup>50</sup>

---

<sup>44</sup> Claimant’s Request for Provisional Measures, at para. 16 (citing *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2), Decision on Provisional Measures, dated 25 September 2001, 6 *ICSID Reports* (2004), pp. 373-397, at p. 379, **Exhibit CA-5**).

<sup>45</sup> Claimant’s Request for Provisional Measures, at para. 25.

<sup>46</sup> Claimant’s Request for Provisional Measures, at para. 25(a).

<sup>47</sup> Claimant’s Request for Provisional Measures, at para. 25(b).

<sup>48</sup> Claimant’s Request for Provisional Measures, at para. 15.

<sup>49</sup> Claimant’s Request for Provisional Measures, at para. 14(a).

<sup>50</sup> Claimant’s Request for Provisional Measures, at para. 14(b).

Decision on the Claimant's Request for Provisional Measures

- iii. “the right of its officers, employees, servants and agents to enter and remain in the State for the purposes of engaging in activities connected with the Claimant’s investments, and to be free from arbitrary or unlawful arrest, prosecution and harassment by the State and its agents;”<sup>51</sup> and
  - iv. “the Claimant’s procedural rights, including its rights to the preservation of the *status quo* and the non-aggravation of the dispute (which are recognised as ‘self-standing rights’) and the preservation of the effectiveness of a future award.”<sup>52</sup>
- b. the Tribunal has *prima facie* jurisdiction, because:
- i. the fact of registration of the Request for Arbitration by ICSID can be taken “as evidence that jurisdiction is not manifestly lacking in this case;”<sup>53</sup> according to the Claimant, the standard that it must satisfy for its Request for Provisional Measures “is only fractionally (if at all) higher than the ‘not manifestly lacking’ standard applicable at the registration stage.”<sup>54</sup>
  - ii. as set out in the Claimant’s Request for Arbitration,<sup>55</sup> the Claimant’s position is that each of the jurisdictional requirements set forth in Article 25 of the ICSID Convention is satisfied in this case, including the requirements of “Contracting State ... and a National of another Contracting State,” “investment,” “legal dispute” and consent in writing.<sup>56</sup> With regard to the latter, the Claimant states that “through its national law,

---

<sup>51</sup> Claimant’s Request for Provisional Measures, at para. 14(c).

<sup>52</sup> Claimant’s Request for Provisional Measures, at para. 14(d) (citing *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (PetroEcuador)* (ICSID Case No. ARB/08/5), Procedural Order No. 1 on Burlington Oriente’s Request for Provisional Measures, dated 29 June 2009, at para. 60, **Exhibit CA-4**).

<sup>53</sup> Claimant’s Request for Provisional Measures, at para. 17.

<sup>54</sup> Claimant’s Request for Provisional Measures, at para. 17.

<sup>55</sup> The Claimant cites to paragraphs 60 to 69 of its Request for Arbitration. See Claimant’s Request for Provisional Measures, at para. 18.

<sup>56</sup> See Claimant’s Request for Provisional Measures, at paras. 18-22.

Decision on the Claimant's Request for Provisional Measures

the Respondent has made a standing offer to arbitrate at ICSID (an offer which was made in the form of an 'Investment Guarantee')," and the Claimant accepted this offer by letter dated 26 September 2013.<sup>57</sup>

- c. there is a *prima facie* basis to the Claimant's claims, as set out in the Request for Arbitration,<sup>58</sup> according to the Claimant, "there is at the very least a good arguable case" for each claim;<sup>59</sup>
- d. the provisional measures sought by the Claimant are "necessary" because the actions of the Respondent since the dispute was submitted to arbitration "leave no doubt that it intends to do as much harm as possible" to the Claimant, "or even destroy the company, while it still can," and the Respondent's recent conduct "shows that it is escalating its campaign against the Claimant and its officers."<sup>60</sup> According to the Claimant, "[t]here is therefore a serious danger in waiting until the final award to give the Claimant relief;"<sup>61</sup> and
- e. as to the standard of harm, "either measure [*i.e.*, that the harm is 'substantial' or 'irreparable'] is satisfied" in this case.<sup>62</sup> According to the Claimant, if the Tribunal were to prefer the "irreparable harm" test, it would be satisfied because:
  - i. the State's conduct, as described in Sir Mekere Morauta's witness statement, "is such that the physical safety and liberty of the Claimant's staff is at risk. Such harm would, if it was allowed to materialise, be incapable of being cured through an award of money damages;"<sup>63</sup>

---

<sup>57</sup> Claimant's Request for Provisional Measures, at para. 22.

<sup>58</sup> The Claimant cites to paragraphs 54-55 of its Request for Arbitration. See Claimant's Request for Provisional Measures, at para. 23.

<sup>59</sup> Claimant's Request for Provisional Measures, at para. 23.

<sup>60</sup> Claimant's Request for Provisional Measures, at para. 24.

<sup>61</sup> Claimant's Request for Provisional Measures, at para. 24.

<sup>62</sup> Claimant's Request for Provisional Measures, at para. 25.

<sup>63</sup> Claimant's Request for Provisional Measures, at para. 25(a) (citing 1st Sir Mekere Morauta WS, at pp. 40-42).

Decision on the Claimant's Request for Provisional Measures

- ii. the State's conduct "threatens the very existence of the Claimant and the purposes for which it was established;" "where the actions in question would, if not restrained by provisional measures, effectively bring an end to the investor's business, then the harm feared may well be 'irreparable' notwithstanding the fact that the loss could (at least in theory) be measured in money."<sup>64</sup>

48. Accordingly, the Claimant requests that the Tribunal:

*urgently recommend to the Respondent that, pending final determination of the dispute, the Respondent refrain from:*

- (a) taking (or threatening to take) any further steps under Section 6 of the Tenth Supplemental Act, or otherwise interfering with or impeding the Claimant's lawful operation in PNG in accordance with the Program Rules;*
- (b) harassing, arresting, or commencing any criminal prosecution against any officer, employee, servant or agent of the Claimant in connection with the performance of their responsibilities or functions as officers, employees, servants or agents of the Claimant (or making any further threats to do so); and*
- (c) taking any further steps that may aggravate the dispute, disturb the status quo as at the date of this Request, or otherwise impede the orderly resolution of the dispute in accordance with the ICSID Convention.<sup>65</sup>*

*B. The Respondent's Observations on the Claimant's Request for Provisional Measures*

49. In the Respondent's Observations, the Respondent seeks a dismissal of the Claimant's Request for Provisional Measures on the basis that it, "apart from falling short of the threshold requirements," "prays for intrusive interim measures that are unsupported by

---

<sup>64</sup> Claimant's Request for Provisional Measures, at para. 25(b).

<sup>65</sup> Claimant's Request for Provisional Measures, at para. 27.

Decision on the Claimant's Request for Provisional Measures

any showing of urgency, are entirely unnecessary and unrelated to the reliefs sought in the arbitration.”<sup>66</sup>

50. The Respondent observes that the Claimant's Provisional Measure 1 “is sought in essentially the same terms as the final relief sought” in paragraph 73(ii) of the Request for Arbitration,<sup>67</sup> and that such request “offends the principle that an arbitral tribunal cannot grant a decision on the merits under the guise of interim relief ... , and is alone grounds for the Tribunal to deny” this request.<sup>68</sup> The Respondent adds that the declaration sought in paragraph 73(ii) of the Request for Arbitration “is also one which the Tribunal does not even have jurisdiction to grant on a final basis ... much less on an interim basis” because, among other things, the jurisdictional requirements set out in Article 25(1) of the ICSID Convention are absent.<sup>69</sup>
51. According to the Respondent, the burden is on the Claimant to establish why the Tribunal should “take the extraordinary step of granting” provisional measures, by “showing: (a) *prima facie* jurisdiction, (b) a *prima facie* basis to the reliefs sought in the arbitration, (c) urgency, and (d) necessity in order to avoid irreparable harm.”<sup>70</sup> The Respondent argues that the Claimant's Request for Provisional Measures is “wholly without merit and must be denied,”<sup>71</sup> because the Request and Sir Mekere Morauta's witness statement filed in support thereof “are thin on evidence, contradicted by recent events, and tellingly, do not (presumably because they cannot) address the question of ‘urgency’ at all.”<sup>72</sup>
52. The Respondent discusses the Singapore Court proceedings at some length,<sup>73</sup> and argues that, “given the Claimant's failure (on non-jurisdictional grounds) to obtain the self-same

---

<sup>66</sup> Respondent's Observations, at para. 1.

<sup>67</sup> In paragraph 73(ii) of the Request for Arbitration, the Claimant sought “a declaration that Section 6 of the Tenth Supplemental Act is void and of no legal effect on the Claimant, and an order permanently restraining the Respondent from taking any steps to ‘restructure’ the Claimant or influence its operations in any way other than in accordance with the Memorandum and Articles of Association and the Program Rules.”

<sup>68</sup> Respondent's Observations, para. 1(a) at fn. 1 (emphasis omitted).

<sup>69</sup> Respondent's Observations, para. 1(a) at fn. 1 (emphasis omitted).

<sup>70</sup> Respondent's Observations, at para. 2 (emphasis and footnotes omitted).

<sup>71</sup> Respondent's Observations, at para. 3.

<sup>72</sup> Respondent's Observations, at para. 2.

<sup>73</sup> See Respondent's Observations, at paras. 14-25.

Decision on the Claimant's Request for Provisional Measures

provisional measures in the Singapore Courts, the Singapore Court's finding that those measures are not urgent/necessary ... ought, in the absence of any changed circumstances (and there is none, as the Claimant itself recognises), to preclude the Claimant from seeking a further bite of the 'provisional apple'.<sup>74</sup>

53. The Respondent further argues that the Tribunal should dismiss the Request for Provisional Measures because: (1) "the threshold requirements of *prima facie* jurisdiction and *prima facie* right to the reliefs sought are manifestly absent,"<sup>75</sup> and (2) "the prevailing circumstances and preponderance of evidence show that the measures sought in the [Request for Provisional Measures] are neither urgent nor necessary."<sup>76</sup>
54. On point (1), the Respondent argues that none of the threshold requirements has been established in this case.<sup>77</sup>
55. First, there is "a manifest lack of jurisdiction, given the non-existence of a 'private foreign investment'" and "the absence of the State's consent to ICSID arbitration."<sup>78</sup> The Respondent observes that the Claimant's reference to the fact of registration as "evidence that jurisdiction is not manifestly lacking" is "misguided, as registration under Article 36(3) simply reflects the ICSID Secretariat's view that the dispute is not manifestly outside ICSID's jurisdiction, and cannot supplant the Tribunal's own view of its jurisdiction over the matter."<sup>79</sup>
56. Second, the Respondent asserts that the Claimant failed to establish a *prima facie* basis to its claims in the Request for Arbitration.<sup>80</sup> The Respondent notes, in particular, that the

---

<sup>74</sup> Respondent's Observations, at para. 25 (citing Born, *International Commercial Arbitration*, Kluwer (2nd ed., 2014), at pp. 3787-3790, **Exhibit RL-36**).

<sup>75</sup> Respondent's Observations, at para. 4.

<sup>76</sup> Respondent's Observations, at para. 5.

<sup>77</sup> See Respondent's Observations, at para. 27.

<sup>78</sup> Respondent's Observations, at para. 28 (emphasis omitted).

<sup>79</sup> Respondent's Observations, at para. 28 (emphasis and footnote omitted).

<sup>80</sup> Respondent's Observations, at para. 29.

Decision on the Claimant's Request for Provisional Measures

Claimant is wrong that Section 37(1) of the IPA is a most-favoured nation (or MFN) clause.<sup>81</sup>

57. The Respondent argues that the Request for Provisional Measures “must be dismissed outright” for the above reasons.<sup>82</sup>
58. On point (2), the Respondent states that “[e]ven assuming that the threshold requirements are cleared, the same outcome would be reached as the substantive criterion [sic] of ‘urgency’ and ‘necessity’ have not been shown to exist.”<sup>83</sup>
59. In relation to *urgency*, the Respondent argues that “[t]he timing of the filing of the [Request for Provisional Measures], its content (or lack of) and the prevailing circumstances suggest that there is simply no urgency for the Provisional Measures sought.”<sup>84</sup>
60. First, the Claimant's Request for Provisional Measures “is in fact silent on the question of ‘urgency,’” which by definition means that this key requirement “remains unsatisfied.”<sup>85</sup>
61. Second, the Claimant is unable to explain the 9-month delay between its Request for Arbitration, in which the Claimant stated that it would “shortly” be filing a request for interim relief, and its Request for Provisional Measures; the Respondent submits that this delay calls for an explanation, as “the bulk of the alleged ‘predatory ... acts and measures of [the State]’ which purportedly triggered the [Request for Provisional Measures] took place in or around end-2013 (*i.e.*, those grounds had existed by the time the [Request for Arbitration] was registered in December 2013).”<sup>86</sup> The Respondent points out that the

---

<sup>81</sup> See Respondent's Observations, at para. 29.

<sup>82</sup> Respondent's Observations, at para. 30.

<sup>83</sup> Respondent's Observations, at para. 31.

<sup>84</sup> Respondent's Observations, at para. 32.

<sup>85</sup> Respondent's Observations, at para. 33 (emphasis and footnote omitted).

<sup>86</sup> Respondent's Observations, at para. 34 (citing 1st Daniel Rolpagarea WS, at para. 70) (emphasis in original). The Respondent points out that: (a) the appointment of the Transitional Management Team by the Respondent, removal of the Claimant's directors, and termination of Mr David Sode's appointment as the Claimant's Managing Director took place on 24 October 2013; (b) the Respondent's instructions “to freeze the Claimant's bank accounts were given in October to November 2013;” and (c) the “alleged harassment and intimidation of Mr Lawrence Stephens

Decision on the Claimant's Request for Provisional Measures

Claimant's assertion that it "was unable to put forward its request for Provisional Measures until the Tribunal was fully constituted on 17 June 2014' ... was clearly an afterthought," because the Claimant was well aware of the procedure under ICSID Arbitration Rule 39(5) allowing a party to submit a request for interim relief prior to the constitution of the Tribunal, as is apparent from the Claimant's statements in its Request for Arbitration.<sup>87</sup>

62. Third, "far from discharging the 'basic evidentiary requirement' that 'the complained-of act is actually in the works and likely to take place during the course of the arbitration'," <sup>88</sup> the Claimant relies on (a) past events, which "obviously would not suffice for purposes of establishing 'urgency' at present;" <sup>89</sup> (b) bare allegations unsubstantiated by evidence; <sup>90</sup> and (c) "its own speculative fear that hostile actions may be taken against it" whereas interim measures "are reserved for 'situations of real (and not imagined) harm' and are not meant to protect against 'potential or hypothetical harm susceptible to result from uncertain actions'." <sup>91</sup>
63. Finally, with respect to the Claimant's requested Provisional Measure 1, the Respondent notes that it was not mentioned among the intended provisional measures listed in the Claimant's 25 June 2014 letter to the Tribunal, and the "conclusion that flows from this is that [the request for Provisional Measure 1] must have arisen from (any alleged) changed circumstances in the days between the Claimant's 25 June 2014 letter and the date of the

---

and Mr Mark Davis similarly took place in October to November 2013." Respondent's Observations, at para. 35(a)-(c) (emphasis and footnotes omitted).

<sup>87</sup> Respondent's Observations, at para. 36 (citing the Claimant's 18 July 2014 letter and the Claimant's Request for Arbitration, at para. 75).

<sup>88</sup> Respondent's Observations, at para. 37 (citing Mouawad & Silbert, "A Guide to Interim Measures in Investor-State Arbitration" (2013) 29(3) *Arbitration International* 381 at p. 388, **Exhibit RL-37**) (emphasis omitted).

<sup>89</sup> Respondent's Observations, at para. 37 (footnote omitted).

<sup>90</sup> Respondent's Observations, at para. 37 (citing the Claimant's Request for Provisional Measures, paras. 7-11) (emphasis omitted).

<sup>91</sup> Respondent's Observations, at para. 37 (citing, respectively, Mouawad & Silbert, "A Guide to Interim Measures in Investor-State Arbitration" (2013) 29(3) *Arbitration International* 381, at p. 388, **Exhibit RL-37**, and *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* (ICSID Case No. ARB/06/11), Decision on Provisional Measures, dated 17 August 2007, at para. 89, **Exhibit RL-29**) (emphasis omitted).

Decision on the Claimant's Request for Provisional Measures

filing of the Application (14 July 2014).<sup>92</sup> Yet, the only post-25 June 2014 event relied upon by the Claimant – *i.e.*, the “purported denial of tax clearance for the Claimant on the State’s instruction in July 2014” – “is irrelevant” because this allegation is unsubstantiated, and even if it were true, clearance would have been denied because the Claimant “has failed to comply with the relevant tax laws (or there are grounds to suspect so).”<sup>93</sup> For the Respondent, if such a measure had been taken in response to the Claimant’s non-compliance with the taxation regime, “that would have had nothing to do with the present dispute.”<sup>94</sup>

64. In relation to *necessity*, the Respondent argues that the criterion of “necessity” is also “absent, given that the Claimant cannot even establish the substratum of facts/events which the [Claimant’s requested] Provisional Measures are meant to address.”<sup>95</sup> The Respondent takes each requested provisional measure in turn.
65. First, with respect to Provisional Measure 1, the Respondent asserts that the Claimant “has not explained (much less proven) ... how the State has been ‘interfering with or impeding’ the Claimant’s operations in PNG.”<sup>96</sup> The Respondent states that:
- a. the Claimant’s “operations and assets are (and remain) controlled by Sir Mekere and his allies (to the complete exclusion of the State, including the Transitional Management Team),”<sup>97</sup>
  - b. the Claimant “has little or no presence in PNG” as a result of its decision to cease its development programs/projects and shift its operations to Australia;<sup>98</sup> and

---

<sup>92</sup> Respondent’s Observations, at para. 38.

<sup>93</sup> Respondent’s Observations, at para. 38.

<sup>94</sup> Respondent’s Observations, at para. 38.

<sup>95</sup> Respondent’s Observations, at para. 39.

<sup>96</sup> Respondent’s Observations, at para. 40.

<sup>97</sup> Respondent’s Observations, at para. 41 (emphasis omitted). According to the Respondent, this enabled Sir Mekere and his allies to (a) unilaterally and wrongfully amend the Claimant’s M&A and wrongfully pass resolutions “so as to dilute/exclude the State’s oversight of the Claimant’s operations and assets;” (b) cease/terminate the development projects/programs which the Claimant had undertaken in PNG; and (c) “dissipate its assets in breach of ... the Program Rules.” Respondent’s Observations, at para. 41.

Decision on the Claimant's Request for Provisional Measures

- c. “[g]iven that the Claimant’s Board and its officers remain in complete control of the Claimant and its assets, the State is simply not in a position to affect the operations of the Claimant, whether in PNG or any other country.”<sup>99</sup> The Respondent expands on the facts which it says show that “the State has no means to influence/hinder the Claimant’s operations (or seize its assets)” at paragraph 44 of its Observations.<sup>100</sup>
66. Second, with respect to Provisional Measure 2, the Respondent states that the Claimant’s assertions that the Respondent “had sought to threaten, intimidate and harass the Claimant’s officers are similarly unsubstantiated and untrue.”<sup>101</sup> The Respondent argues that, even as at end-March 2014, the Claimant was unable to particularise the alleged incidents of harassment (including the alleged “harassment” of Mr Mark Davis and Mr Lawrence Stephens) despite the alleged incidents purportedly occurring in 2013.<sup>102</sup> In any event, for the Respondent, the alleged harassment of these two individuals is “more illusory than real.”<sup>103</sup> According to the Respondent, “the deportation of Mr Davis arose from Mr Davis’ breach of visa conditions,” and no action was taken by the UK authorities regarding the alleged threat to Mr Stephens.<sup>104</sup> The Respondent argues that it, as a sovereign, has a “right and obligation to enforce its criminal laws within its own territory, and unless a ‘strong linkage’ can be shown (and there is none here) between the criminal proceedings and the investment dispute before the ICSID tribunal, which

---

<sup>98</sup> Respondent’s Observations, at para. 42.

<sup>99</sup> Respondent’s Observations, at para. 43.

<sup>100</sup> See Respondent’s Observations, at para. 44 (emphasis omitted). Among the relevant alleged facts, the Respondent notes the following: (a) the Claimant’s use of its assets to finance the litigation in Singapore court; (b) the Transitional Management Team “never took its position, and it is Sir Mekere (and his allies) who remain in complete control of the Claimant;” and (c) the State has not succeeded in freezing the Claimant’s assets in Bank South Pacific.

<sup>101</sup> Respondent’s Observations, at para. 45.

<sup>102</sup> See Respondent’s Observations, at para. 46.

<sup>103</sup> Respondent’s Observations, at para. 47.

<sup>104</sup> Respondent’s Observations, at para. 47 (citing 1st Sir Mekere Morauta WS, at para. 143, Exhibit SMM-42, and 1st Daniel Rolpagarea WS, at paras. 74(a), (c)).

Decision on the Claimant's Request for Provisional Measures

threatens to undermine the integrity of the arbitral process, the State's domestic criminal proceedings is a domain upon which the Tribunal should not infringe."<sup>105</sup>

67. Third, in respect of Provisional Measure 3, the Respondent argues that this requested measure which relates to "a 'self-standing right' to the preservation of the *status quo* ignores the weight of authority confirming that the rights to be preserved by provisional measures are circumscribed by the requesting party's claims for reliefs, *i.e.*, there is no 'self-standing right' to the protection of the *status quo* in general."<sup>106</sup> The Respondent points out that, in any event, *the Respondent itself* also applied to the Singapore Courts for orders preserving the *status quo*,<sup>107</sup> and was successful in obtaining interim relief from the Singapore Courts "enjoining the Claimant from affecting the *status quo* and aggravating the dispute."<sup>108</sup> According to the Respondent, the Claimant should not be allowed to avail itself of Provisional Measure 3 under the principle that a tribunal "will not issue an injunction where it is found that the petitioner does not have clean hands."<sup>109</sup> The Respondent adds that it "simply does not have the ability to disturb the *status quo* of the matter," and therefore there is no need for Provisional Measure 3.<sup>110</sup>
68. The Respondent concludes that the Claimant's complaints appear rooted in a distrust of the current PNG Government, or a political disagreement between Sir Mekere and the current administration.<sup>111</sup> According to the Respondent, "[a]rbitral tribunals have long been wary of the possible misuse of provisional measures for extraneous/tactical purposes and have thus insisted on a strict compliance with the requisite threshold and substantive requirements," and this case should not be an exception.<sup>112</sup>

---

<sup>105</sup> Respondent's Observations, at para. 48 (footnotes omitted).

<sup>106</sup> Respondent's Observations, at para. 50 (emphasis and footnotes omitted).

<sup>107</sup> Respondent's Observations, at para. 52. *See also* Respondent's Observations, at paras. 14-25.

<sup>108</sup> Respondent's Observations, at para. 51.

<sup>109</sup> Respondent's Observations, at para. 51 (citing Yesilirmak, *Provisional Measures in International Commercial Arbitration*, Kluwer (2005), at para. [5-42], **Exhibit RL-34**).

<sup>110</sup> Respondent's Observations, at para. 52.

<sup>111</sup> *See* Respondent's Observations, at para. 53.

<sup>112</sup> Respondent's Observations, at para. 54 (footnote omitted).

Decision on the Claimant's Request for Provisional Measures

69. Accordingly, the Respondent requests that the Claimant's Request for Provisional Measures be dismissed in its entirety, with costs.<sup>113</sup>

*C. The Claimant's Reply on Provisional Measures*

70. In its Reply, the Claimant argues that the question for the Tribunal is "whether there is evidence that during this timeframe [*i.e.*, the duration of the arbitration] there exist circumstances which present a serious danger to the Claimant or the integrity of the proceedings;" if there is evidence of such danger (and the Claimant says that "there certainly is"), then "provisional measures are necessary and may be granted provided that the Claimant's case – both on jurisdiction and the merits – is not destined to fail (and, in the Claimant's submission, it certainly is not)."<sup>114</sup>

71. The Claimant argues that the Respondent has admitted (or at least has not denied) most of the material facts that underpin the Claimant's Request for Provisional Measures, including that the Respondent:

- a. expropriated the Claimant's shares;<sup>115</sup>
- b. imposed a travel ban on the Claimant's then Chairman, Professor Garnaut, and refused to grant Mine Life Extension to OTML;<sup>116</sup>
- c. unilaterally took a range of "hostile and aggravating actions against the Claimant" since taking the Claimant's shares in OTML,<sup>117</sup> including: (i) "attempting to seize control of the Claimant's assets and operations;"<sup>118</sup> (ii) "writing to the Claimant's banks to block the access to its funds;"<sup>119</sup> (iii) "purporting to replace its board of directors with a 'Transitional Management Team' of its own

---

<sup>113</sup> Respondent's Observations, at para. 55.

<sup>114</sup> Claimant's Reply, at para. 4 (emphasis omitted).

<sup>115</sup> Claimant's Reply, at para. 6.

<sup>116</sup> Claimant's Reply, at para. 7.

<sup>117</sup> Claimant's Reply, at para. 8.

<sup>118</sup> Claimant's Reply, at para. 8(a).

<sup>119</sup> Claimant's Reply, at para. 8(b) (citing 1st Daniel Rolpagarea WS, at para. 96).

Decision on the Claimant's Request for Provisional Measures

choosing;”<sup>120</sup> (iv) “freezing certain of the Claimant’s assets in PNG;”<sup>121</sup> (v) “threatening, intimidating and harassing the Claimant’s officers and staff;”<sup>122</sup> and (vi) “announcing its intention to establish a ‘Commission of Inquiry’ to investigate the supposedly ‘criminal’ conduct of the Claimant’s officers.”<sup>123</sup>

72. The Claimant submits that the Respondent’s argument that “while [the Respondent] has done these things, it did so too long ago for its actions to be relied upon as a basis for provisional measures” cannot be right.<sup>124</sup> According to the Claimant, “there is a real danger that, pending the completion of this arbitration, the Claimant will suffer further attacks by the Respondent and the dispute will be aggravated, if the provisional measures are not granted.”<sup>125</sup>
73. The Claimant responds to the Respondent’s arguments on three points: (1) necessity of provisional measures requested by the Claimant;<sup>126</sup> (2) the Singapore Court proceedings;<sup>127</sup> and (3) the threshold requirements of *prima facie* jurisdiction and *prima facie* right to the reliefs sought in the arbitration.<sup>128</sup>
74. First, with regard to the issue of *necessity*, the Claimant argues:
- a. in response to the Respondent’s argument that “the provisional measures are not urgent ... as the Claimant waited nine months” after filing the Request for Arbitration to submit its Request for Provisional Measures,<sup>129</sup> the Claimant notes that it filed its Request for Provisional Measures “promptly after the Tribunal was constituted (the process of which was delayed by the State’s own actions)” and

---

<sup>120</sup> Claimant’s Reply, at para. 8(c) (citing 1st Sir Mekere Morauta WS, at paras. 127-129).

<sup>121</sup> Claimant’s Reply, at para. 8(d).

<sup>122</sup> Claimant’s Reply, at para. 8(e) (citing 1st Sir Mekere Morauta WS, at paras. 141-148).

<sup>123</sup> Claimant’s Reply, at para. 8(f).

<sup>124</sup> Claimant’s Reply, at para. 9.

<sup>125</sup> Claimant’s Reply, at para. 10.

<sup>126</sup> See Claimant’s Reply, at paras. 11-24.

<sup>127</sup> See Claimant’s Reply, at paras. 25-31.

<sup>128</sup> See Claimant’s Reply, at paras. 32-37.

<sup>129</sup> Claimant’s Reply, at para. 11.

Decision on the Claimant's Request for Provisional Measures

that “the focus is on what the State has done (and, based on that conduct, what the State is likely to do).”<sup>130</sup>

- b. Article 47 of the ICSID Convention says nothing about urgency, which was not included in the text when the Convention was drafted, and the Tribunal is not bound by the decisions of other ICSID tribunals which “have found that a requirement of ‘urgency’ is implied in the text of Article 47 of the ICSID Convention;”<sup>131</sup> rather, the Tribunal “may ... give natural priority to the requirement that the drafters did include: the requirement that the measures must be necessary;”<sup>132</sup>
- c. even if the Respondent is right that there is an implied requirement of “urgency” in Article 47, the proper temporal question is “can the applicant wait until a final award is rendered to receive the relief it seeks now?” (and not how much time has passed before the Request for Provisional Measures).<sup>133</sup> According to the Claimant, the answer to its articulated question is “no” in view of the “undisputed facts” including events shortly preceding the filing of its Request for Provisional Measures;<sup>134</sup>
- d. in response to the Respondent's assertions that the Singapore Court “(allegedly) found that there was no urgency in the Claimant's application for an interlocutory injunction in that forum,” and the scholarly opinion of the President of this Tribunal that “a national court's finding on urgency should be followed by an arbitral tribunal absent ‘changed circumstances’,”<sup>135</sup> the Claimant notes that the circumstances have recently changed (for the worse) since the Singapore court's

---

<sup>130</sup> Claimant's Reply, at para. 12 (emphasis omitted).

<sup>131</sup> Claimant's Reply, at para. 13.

<sup>132</sup> Claimant's Reply, at para. 13 (emphasis omitted).

<sup>133</sup> Claimant's Reply, at paras. 14, 15 (emphasis and footnote omitted).

<sup>134</sup> Claimant's Reply, at para. 15 (citing 2nd Sir Mekere Morauta WS, at para. 17(b)).

<sup>135</sup> Claimant's Reply, at para. 16 (citing Born, *International Commercial Arbitration*, Kluwer (2nd ed., 2014), at p. 3787, **Exhibit RL-36**).

Decision on the Claimant's Request for Provisional Measures

decision rejecting the Claimant's *ex parte* application for injunctive relief in October 2013;<sup>136</sup>

- e. in response to the Respondent's assertions that it is "unable to interfere with the Claimant's operations in PNG," the Claimant contends that this suggestion is "absurd," *inter alia*, because the Tenth Supplemental Act "gives the State the (purportedly long-arm) power to 'restructure [the Claimant] and its operations', and the State has – at least within its own borders – already used that power to great effect," and has taken other measures that "are doing real harm" to the Claimant;<sup>137</sup>
- f. in response to the Respondent's argument that "it has a sovereign right to enforce its own laws," the Claimant submits that this assertion "misses the point," because the focus of the Claimant's application is on the Respondent's "compliance with its *international* legal obligations;"<sup>138</sup> the Claimant's officers need to "enter and exit PNG to prepare for this arbitration and manage the Claimant's investments and operations," and through the most-favoured nation provision of the IPA, they "have a right to do so freely."<sup>139</sup> The Claimant adds that there are "at least 6 staff members of the Claimant [who] are still in PNG," including its CEO, Mr David Sode, who need protection;<sup>140</sup>
- g. in response to the Respondent's argument that the Commission of Inquiry has not yet been constituted and there is "no reason for the Claimant to be concerned," the Claimant argues that ICSID tribunals have "shown themselves willing to take steps necessary to protect the investor (and the arbitration process) from this kind of 'home town justice'."<sup>141</sup> In this respect, the Claimant notes that the tribunal in *City Oriente Ltd. v. Ecuador* held that threats by a host State to commence

---

<sup>136</sup> Claimant's Reply, at paras. 16, 17.

<sup>137</sup> Claimant's Reply, at para. 19.

<sup>138</sup> Claimant's Reply, at para. 21 (emphasis in original).

<sup>139</sup> Claimant's Reply, at para. 21.

<sup>140</sup> Claimant's Reply, at para. 22 (citing Claimant's Request for Arbitration, at para. 48(viii)).

<sup>141</sup> Claimant's Reply, at para. 23.

Decision on the Claimant's Request for Provisional Measures

criminal proceedings against the claimant's officials justified the recommendation of provisional measures;<sup>142</sup> and

- h. the Respondent's argument that the "preservation of the *status quo* and non-aggravation of the dispute is not a 'free-standing' right which is worthy of protection via provisional measures" "flies in the face of international law and ICSID practice;"<sup>143</sup> they must be ensured for the effectiveness of this arbitration process.<sup>144</sup>

75. Second, with regard to the *Singapore court proceedings*, the Claimant contends that:

- a. The Singapore court proceedings "relate to wholly different matters and are not duplicative;"<sup>145</sup> those proceedings concern "domestic Singapore law matters relating to the corporate governance of the Claimant" which this Tribunal could not decide upon, even if it were requested to do so.<sup>146</sup> Under Singapore law, the Court "has no jurisdiction to impose an injunction on another sovereign state," which is why the Claimant seeks this relief before this Tribunal.<sup>147</sup> In any event, the Claimant "is not seeking any injunctive relief against the State" in the Singapore proceedings.<sup>148</sup>

---

<sup>142</sup> Claimant's Reply, at para. 23 (citing *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/06/21), Decision on Provisional Measures, dated 19 November 2007, at para. 69, **Exhibit CA-13**).

<sup>143</sup> Claimant's Reply, at para. 24 (emphasis and footnotes omitted).

<sup>144</sup> Claimant's Reply, at para. 24.

<sup>145</sup> Claimant's Reply, at para. 26. The Claimant elaborates on this point, stating that the relief it seeks before the Singapore Court includes: (a) "declarations that the State's purported removal of the Claimant's board of directors through legislation enacted in PNG has no effect under Singapore law, and that the duly-appointed members of the Claimant's board of directors continue to have full authority to manage the business of the Claimant in accordance with its M&A;" and (b) "injunctions restraining the *individuals* (but not the State) who were purportedly appointed by the State as members of a 'Transitional Management Team' from attempting to interfere with the Claimant's operations." Claimant's Reply, at para. 27 (emphasis in original). *See also* Claimant's Reply, at para. 30 (elaborating upon why the Claimant maintains that the relief it sought in the Singapore Court is not duplicative of its requested provisional measures in this proceeding).

<sup>146</sup> Claimant's Reply, at para. 28 (emphasis omitted).

<sup>147</sup> Claimant's Reply, at para. 29 (citing section 15(2) of the Singapore State Immunity Act (Cap. 313), **Exhibit CL-21**).

<sup>148</sup> Claimant's Reply, at para. 30(c).

Decision on the Claimant's Request for Provisional Measures

- b. The Singapore Court's orders were "simply holding orders, pending the conclusion of the hearing of the injunction application."<sup>149</sup>
76. Third, with respect to the *threshold requirements of prima facie jurisdiction and prima facie case on the merits*, the Claimant states that:
- a. applying the ICSID Tribunal's standard articulated in *Pey Casado v. Chile*,<sup>150</sup> what must be demonstrated is "the prima facie existence of jurisdiction, or, to couch this in negative terms, the absence of a clear lack of jurisdiction;" this threshold "is only fractionally (if at all) higher than the standard in the context of the Respondent's Rule 41(5) Objection" and the Claimant's jurisdictional arguments in its Reply Observations on the Respondent's Rule 41(5) Objections (filed on 8 August 2014 in this proceeding) are "sufficient for both Rule 41(5) and provisional measures ('prima facie') purposes;"<sup>151</sup>
- b. the Claimant repeats its Reply Observations on the Respondent's Rule 41(5) objections on the issue of the Claimant's *prima facie* right to the relief it seeks in this arbitration, and notes that: (i) the State does not dispute the Claimant's *prima facie* right to the reliefs it seeks with respect to expropriation; and (ii) the Claimant's position is that Section 37(1) of the IPA is an MFN clause, and even if it is wrong on the MFN clause, "it is still entitled to the reliefs it seeks under either PNG law or international law (or both)."<sup>152</sup> The Claimant concludes that, "even if the State is right that the Claimant is not entitled to MFN treatment, the Claimant still has a *prima facie* case for the relief it seeks from the Tribunal."<sup>153</sup>

---

<sup>149</sup> Claimant's Reply, at para. 31 (emphasis omitted).

<sup>150</sup> *Victor Pey Casado and President Allende Foundation v. Republic of Chile* (ICSID Case No. ARB/98/2), Decision on Provisional Measures, dated 25 September 2001, 6 *ICSID Reports* (2004), pp. 373-397, at p. 379, **Exhibit CA-5**.

<sup>151</sup> Claimant's Reply, at para. 34.

<sup>152</sup> Claimant's Reply, at para. 36.

<sup>153</sup> Claimant's Reply, at para. 37.

Decision on the Claimant's Request for Provisional Measures

77. The Claimant reiterates its request that the Tribunal grant its Request for Provisional Measures because it “needs and deserves protection.”<sup>154</sup>

*D. Parties' Correspondence Relating to Provisional Measures Post-Dating the Claimant's Reply*

78. On 14 October 2014, the Claimant wrote to the Tribunal to provide an update on recent developments that it believed relevant to the Tribunal's consideration of the Claimant's Request for Provisional Measures.<sup>155</sup> In its letter, the Claimant expressed concerns about “the serious adverse impact” of the Respondent's actions on the management and performance of OTML<sup>156</sup> since the Respondent “(unlawfully) increased its direct ownership in OTML to 87.8%.”<sup>157</sup> According to the Claimant, recent developments “point to a significant diminution in value of the Ok Tedi Mine and also to a worrying move away from global standards of transparency and accountability.”<sup>158</sup> Among these developments, the Claimant noted: (a) the diminution in the net profits generated by OTML in 2013 (US\$17 million compared to \$472 million in 2012); (b) the fact that OTML paid no dividends in 2013; (c) the increase in remuneration of OTML's Managing Director and CEO, Nigel Parker; (d) “operating costs (in PNG Kina) were over budget by 16%, and US\$80m (unbudgeted) was spent on ‘redundancy payout’ expenses in December 2013;” (e) the OTML Board of Directors “decided not to renew OTML's membership of Extractive Industries Transparency Initiative;” and (f) in addition to the four current directors of OTML, “there are to be three so-called ‘independent’ directors, as part of a restructuring sanctioned by the Respondent's National Executive Council.”<sup>159</sup>

79. The Claimant raised its concern that “if it is restored in its position as majority shareholder of OTML, serious (if not irreparable) harm may have already been done to

---

<sup>154</sup> Claimant's Reply, at para. 38.

<sup>155</sup> See Letter from the Claimant, dated 14 October 2014.

<sup>156</sup> Letter from the Claimant, dated 14 October 2014, at para. 6.

<sup>157</sup> Letter from the Claimant, dated 14 October 2014, at para. 5.

<sup>158</sup> Letter from the Claimant, dated 14 October 2014, at para. 6.

<sup>159</sup> Letter from the Claimant, dated 14 October 2014, at para. 5. The Claimant relies on the 2013 OTML Annual Review as evidence of these developments.

Decision on the Claimant's Request for Provisional Measures

the company, both in economic terms and in terms of its reputation as a miner.”<sup>160</sup> The Claimant argued that the “*status quo* of OTML’s management and economic performance must be preserved if the future order of restitution is to be effective.”<sup>161</sup> The Claimant reiterated its Request for Provisional Measures, “including an order for maintaining the *status quo*.”<sup>162</sup>

80. On 24 October 2014, the Respondent replied to the Claimant’s 14 October letter, denying all allegations made in the Claimant’s letter and stating that the Claimant “is now seeking to introduce, by way of correspondence, a new basis for its Request” for Provisional Measures, after the briefing phase on provisional measures has closed.<sup>163</sup> The Respondent argued that the “developments” raised in the Claimant’s letter are not new, as they pre-date the passing of the Tenth Supplemental Act and have been brought to the attention of the Claimant’s representative on the OTML Board of Directors;<sup>164</sup> these developments have “nothing to do with the Tenth Supplemental Act” or other actions by the Respondent;<sup>165</sup> and the Claimant has not explained how certain of these developments can be said to have “serious[ly]” and “adverse[ly]” impacted OTML’s management and performance.<sup>166</sup>
81. The Respondent noted that the representative director in OTML would have received weekly Managing Director reports and monthly Operational Reports and would have been updated on these matters; it is therefore surprising for the Claimant to suggest that these matters “have only just come to its attention.”<sup>167</sup> According to the Respondent, the Claimant’s purported concern about these stated developments is “an afterthought, which

---

<sup>160</sup> Letter from the Claimant, dated 14 October 2014, at para. 7.

<sup>161</sup> Letter from the Claimant, dated 14 October 2014, at para. 7.

<sup>162</sup> Letter from the Claimant, dated 14 October 2014, at para. 8.

<sup>163</sup> Letter from the Respondent, dated 24 October 2014, at paras. 2, 4.

<sup>164</sup> Letter from the Respondent, dated 24 October 2014, at paras. 4, 5.

<sup>165</sup> Letter from the Respondent, dated 24 October 2014, at para. 5.

<sup>166</sup> Letter from the Respondent, dated 24 October 2014, at para. 5.

<sup>167</sup> Letter from the Respondent, dated 24 October 2014, at para. 6.

Decision on the Claimant's Request for Provisional Measures

deserves little (if any) weight in the Tribunal's deliberation on the Request [for Provisional Measures]."<sup>168</sup>

82. Furthermore, the Respondent argued that these purported developments provide no support for the Request for Provisional Measures, because "OTML's operations have always been carried out independently of the Claimant (who previously only nominated/appointed 1 out of the 4 directors on OTML's Board), and the Claimant is, in any event, no longer involved in OTML."<sup>169</sup> The Respondent contends that the Claimant "is seeking a general order 'for maintaining the status quo' to curtail the OTML Board's ability to make operational decisions in the ordinary course of business ... and bring OTML operations to a standstill."<sup>170</sup> The Respondent contends that there is no basis for such a "drastic order, bearing in mind that OTML is not even a party to these proceedings, and that the 'extraordinary' step of imposing provisional measures is not, even in the ordinary case, one to be lightly taken."<sup>171</sup> The Respondent reiterated its request that the Tribunal dismiss the Claimant's Request for Provisional Measures, with costs.<sup>172</sup>
83. On 6 November 2014, the Claimant replied to the Respondent's letter of 24 October, stating that the letter "has only increased the Claimant's fear that irreparable harm is being done to OTML" and that OTML "is being run into the ground."<sup>173</sup> The Claimant challenged the Respondent's explanations for the various developments raised in the Claimant's 14 October letter<sup>174</sup> (explanations which, according to the Claimant, "pose[] more questions than answers"<sup>175</sup>), and pointed out that, contrary to the Respondent's assertions, most of the developments in question, "all of which show a rapid diminution

---

<sup>168</sup> Letter from the Respondent, dated 24 October 2014, at para. 7.

<sup>169</sup> Letter from the Respondent, dated 24 October 2014, at para. 8.

<sup>170</sup> Letter from the Respondent, dated 24 October 2014, at para. 8.

<sup>171</sup> Letter from the Respondent, dated 24 October 2014, at para. 8 (emphasis in original).

<sup>172</sup> Letter from the Respondent, dated 24 October 2014, at para. 9.

<sup>173</sup> Letter from the Claimant, dated 6 November 2014, at paras. 2, 4.

<sup>174</sup> Letter from the Claimant, dated 6 November 2014, at para. 18.

<sup>175</sup> Letter from the Claimant, dated 6 November 2014, at paras. 6-18.

Decision on the Claimant's Request for Provisional Measures

in the profitability of OTML and the quality of its management,” have “occurred since September 2013.”<sup>176</sup>

84. On 27 November 2014, the Respondent replied to the Claimant's letter of 6 November, inviting the Tribunal to dismiss the Request for Provisional Measures (with costs). The Respondent contended, in particular, that the evidence presented by the Claimant with its recent correspondence “cannot provide a basis for the Request [for Provisional Measures];”<sup>177</sup> this evidence in any event supports the Respondent's assertions in its 24 October letter;<sup>178</sup> and the Claimant remains unable to explain how some of the developments that it invokes (in particular, the appointment of independent directors to the OTML Board) have caused OTML to be “run into the ground.”<sup>179</sup> The Respondent argued that “unsubstantiated speculations cannot justify the imposition of interim measures, which are reserved for situations of real, and not imagined, harm ... , let alone measures which will substantially affect OTML's operations/business, bearing in mind that OTML is not a party to these proceedings.”<sup>180</sup>
85. On 23 December 2014, the Claimant sent a letter to the Tribunal providing information regarding two recent developments “which are of great concern to the Claimant.”<sup>181</sup> The Claimant reported, in particular, recent actions by the Respondent which relate to the transfer of OTML shares to third parties, and which may therefore alter the existing *status quo*. According to the Claimant, PNG Prime Minister O'Neill announced on 14 December 2014 that “a 33% stake in OTML has been given to the people of Western Province, after the State's National Executive Council ‘approved the free transfer of equity in OTML following consultation with landowners and provincial government’.”<sup>182</sup>

---

<sup>176</sup> Letter from the Claimant, dated 6 November 2014, at paras. 3, 18.

<sup>177</sup> Letter from the Respondent, dated 27 November 2014, at para. 3.

<sup>178</sup> Letter from the Respondent, dated 27 November 2014, at para. 4.

<sup>179</sup> Letter from the Respondent, dated 27 November 2014, at para. 4(e).

<sup>180</sup> Letter from the Respondent, dated 27 November 2014, at para. 5.

<sup>181</sup> Letter from the Claimant, dated 23 December 2014, at para. 2.

<sup>182</sup> Letter from the Claimant, dated 23 December 2014, at para. 4.

Decision on the Claimant's Request for Provisional Measures

86. In its letter, the Claimant argued that if “the share transfer (or issue) is allowed to be completed, the *status quo* – both generally and as it relates to the ownership and management of OTML – will be profoundly disturbed,”<sup>183</sup> and “if the State is allowed to transfer (or issue) OTML shares to third parties, the effectiveness of any future order of restitution will be seriously undermined. Thus, the State’s actions directly threaten the integrity of this arbitration.”<sup>184</sup>
87. In addition, the Claimant alleged that there are indications that “there has been a ‘contribution’ of PGK190 million (approximately USD74 million) from OTML to the State,”<sup>185</sup> and that the Claimant is “entitled to question the basis for such ‘contribution’, which exacerbates the Claimant’s fear that irreparable harm is being done to the company pending the resolution of this dispute.”<sup>186</sup>
88. In light of these developments, the Claimant requested that, “as a measure under paragraph 27(c) of the Claimant’s Request for Provisional Measures,” the Tribunal “move as soon as possible to order the State to refrain from transferring or issuing (or completing the transfer or issue of) any OTML shares to any third party, or taking any steps that otherwise change the ownership of OTML, pending determination of this dispute in accordance with the ICSID Convention.”<sup>187</sup>
89. On 9 January 2015, the Respondent replied to the Claimant’s 23 December 2014 letter, arguing that “the Claimant’s purported reliance on these ‘recent developments’ do [sic] not, in any way, warrant any Provisional Measures being granted,” and that the Claimant’s Request for Provisional Measures “should be dismissed with costs.”<sup>188</sup> In its letter, the Respondent states that the Claimant’s position “has dramatically evolved with time” since its Request for Provisional Measures,<sup>189</sup> and that the Claimant “dramatically

---

<sup>183</sup> Letter from the Claimant, dated 23 December 2014, at para. 10.

<sup>184</sup> Letter from the Claimant, dated 23 December 2014, at para. 11.

<sup>185</sup> Letter from the Claimant, dated 23 December 2014, at para. 15.

<sup>186</sup> Letter from the Claimant, dated 23 December 2014, at para. 17.

<sup>187</sup> Letter from the Claimant, dated 23 December 2014, at para. 20.

<sup>188</sup> Letter from the Respondent, dated 9 January 2015, at paras. 18-19.

<sup>189</sup> Letter from the Respondent, dated 9 January 2015, at paras. 2-4.

Decision on the Claimant's Request for Provisional Measures

changed the premise of its [Request for Provisional Measures] from one of protecting the 'very existence of the Claimant and the purposes for which it was established' to that of purportedly protecting 'the ownership and management of OTML'.<sup>190</sup> The Respondent maintains that "there remains no basis for the Claimant's [Request for Provisional Measures]," and notes that "it has never been the Claimant's position that it would not be adequately compensated by damages but only by an order of specific performance;"<sup>191</sup> rather, in this arbitration, the Claimant seeks "the cancellation of the issuance of the OTML shares to State or alternatively, damages for the OTML shares."<sup>192</sup> According to the Respondent, "it is hardly consistent for the Claimant to now claim that it would suffer 'irreparable harm' which cannot be remedied by damages, such that provisional measures are necessitated."<sup>193</sup>

90. With regard to the intended transfer of OTML shares to the people of the Western Province, the Respondent confirms that "the State's National Executive Council had approved the free transfer of 33 percent ownership in OTML to the people of Western Province, following consultation with the stakeholders, including the landowners, with the remaining 67 percent of OTML owned by the people of PNG through the State."<sup>194</sup> The Respondent maintains that the Claimant's concerns with this transfer "are entirely unfounded"<sup>195</sup> because the intended share transfer "is to the people of Western Province"<sup>196</sup> and "ensures that the OTML shares are applied solely for the benefit of those people, and is entirely in line with the Claimant's objects (*i.e.*, to use its assets for the sole benefit of the people) and the Claimant's proclaimed motivations."<sup>197</sup>

---

<sup>190</sup> Letter from the Respondent, dated 9 January 2015, at para. 4.

<sup>191</sup> Letter from the Respondent, dated 9 January 2015, at para. 5.

<sup>192</sup> Letter from the Respondent, dated 9 January 2015, at para. 5.

<sup>193</sup> Letter from the Respondent, dated 9 January 2015, at para. 5.

<sup>194</sup> Letter from the Respondent, dated 9 January 2015, at para. 4 (emphasis omitted).

<sup>195</sup> Letter from the Respondent, dated 9 January 2015, at para. 7.

<sup>196</sup> Letter from the Respondent, dated 9 January 2015, at para. 8 (emphasis omitted).

<sup>197</sup> Letter from the Respondent, dated 9 January 2015, at para. 10. The Respondent notes that "it is ironic that the Claimant sees the Intended Share Transfer as an act of aggravation, while the Claimant's purported gifting of a number of its assets to the communities and government of Western Province is not an act of aggravation, but an act to mitigate the impact of the ongoing dispute between the State and the Claimant on the people of PNG." Letter

Decision on the Claimant's Request for Provisional Measures

91. The Respondent further states that the Claimant “has altered the basis on which its relief is sought,”<sup>198</sup> and “it is the State that is in actual fact seeking to ensure that the *status quo* remains the same by allowing the people of the Western Province to continue to benefit from the OTML shares, which programs the Claimant has discontinued.”<sup>199</sup> The Respondent argues that “there is ... no necessity for any Provisional Measure to prevent ‘irreparable [or substantial] harm’ from being caused to the Claimant” because “the Claimant has not claimed that it would not be properly compensated by ... an award of damages” for the OTML shares.<sup>200</sup> Moreover, the Respondent argues that “any fears which the Claimant alleges to have regarding the Intended Share Transfer are premature and speculative, to say the least” because the State’s National Executive Council “has simply announced that it has approved of the proposed transfer of the shares” but “[n]o transfer has taken place,” and “the intended manner by which the transfer is to be implemented (not to mention the actual transfer) of the OTML shares has not yet been decided, and would be discussed with various stakeholders, including the people of the Western Province.”<sup>201</sup>
92. The Respondent “confirms that the shareholding of OTML remains unchanged and will not be altered until: (a) such further discussions are carried out, (b) a *further* decision is made by the State as to how best to implement the Intended Share Transfer having regard to such discussions, and (c) a transfer is then made pursuant to this *further* decision.”<sup>202</sup> According to the Respondent, “[t]hat being the case, it is entirely speculative for the Claimant to assert that the Intended Share Transfer may result in economic and reputational harm to OTML ... ” and the Claimant’s assertions that “there will be serious,

---

from the Respondent, dated 9 January 2015, at para. 9 (referring to paras. 184 and 197 of 1st Sir Mekere Morauta WS).

<sup>198</sup> Letter from the Respondent, dated 9 January 2015, at para. 11.

<sup>199</sup> Letter from the Respondent, dated 9 January 2015, at para.11 (emphasis omitted).

<sup>200</sup> Letter from the Respondent, dated 9 January 2015, at para. 11.

<sup>201</sup> Letter from the Respondent, dated 9 January 2015, at para. 11 (emphasis omitted).

<sup>202</sup> Letter from the Respondent, dated 9 January 2015, at para. 12 (emphasis in original).

Decision on the Claimant's Request for Provisional Measures

irreparable harm caused to OTML if the provisional measures are not granted" are without merit.<sup>203</sup>

93. With regard to the second issue raised by the Claimant in its 23 December 2014 letter, the Respondent notes that: (1) OTML's financial position has improved in 2014 as compared to 2013;<sup>204</sup> and (2) the contribution made by OTML to the State is in line with the contributions made to the State in previous years and therefore "[t]here is ... nothing questionable about the OTML Contribution, in spite of the Claimant's attempt to cast suspicion on what is otherwise an entirely uncontroversial matter."<sup>205</sup>
94. On 14 January 2015, the Claimant sent an unsolicited letter responding to the Respondent's 9 January letter, stating that the latter "only serves to highlight the urgent need for provisional measures in this case."<sup>206</sup> In its letter, the Claimant argues that "[t]his arbitration is now at a critical juncture" and the Tribunal "should order provisional measures – if not to protect the Claimant, then to protect the process of this arbitration."<sup>207</sup>
95. The Claimant argues that: (1) the Respondent "has unequivocally confirmed its intention to transfer the OTML shares ... , offering only the cynical retort that the Claimant should be happy the [Respondent] will do so because the transfer will benefit the people of the Western Province," and therefore, "[o]n any view, with the intent to transfer confirmed, the [Respondent]'s description of the Claimant's fears as 'premature and speculative' ... is hard to credit;"<sup>208</sup> and (2) instead of saying that "prior to the Tribunal's final award, it will refrain from taking any further steps to transfer the OTML shares, or deal in any other property that is the subject of this dispute," the Respondent is "bold in its disregard

---

<sup>203</sup> Letter from the Respondent, dated 9 January 2015, at para. 12.

<sup>204</sup> See Letter from the Respondent, dated 9 January 2015, at para. 14.

<sup>205</sup> Letter from the Respondent, dated 9 January 2015, at paras. 15-16.

<sup>206</sup> Letter from the Claimant, dated 14 January 2015, at para. 2.

<sup>207</sup> Letter from the Claimant, dated 14 January 2015, at para. 9.

<sup>208</sup> Letter from the Claimant, dated 14 January 2015, at para. 3(a).

Decision on the Claimant's Request for Provisional Measures

for the Tribunal and the arbitration process, purporting to act as the owner of the OTML shares," which "alone is sufficient to justify provisional measures."<sup>209</sup>

96. The Claimant further notes that its request for provisional measures "has had to evolve to address the changing state of affairs" in this case, because "the threat the Claimant faces, and the threat that is now unquestionably posed to the arbitral process, has increased dramatically."<sup>210</sup> The Claimant adds that, in any event, "nothing in the ICSID Convention prevents a party from modifying or expanding its request for provisional measures (indeed, such a rule would defeat the very purpose of provisional measures)."<sup>211</sup>
97. Moreover, the Claimant contends that the "[h]arm of the scale threatened by the [Respondent] qualifies as irreparable on any sensible measure, and it is trite that threats to the integrity of an ICSID arbitration are, by their very nature, irreparable."<sup>212</sup> In addition, according to the Claimant, "just because the Claimant makes an alternative claim for monetary compensation does not give the [Respondent] a free hand to do whatever it likes with the property in dispute;" the Respondent "cannot be allowed to ... take steps to place this property beyond the reach of the Tribunal."<sup>213</sup>
98. Finally, with respect to the OTML Contribution, the Claimant states that the Respondent's 9 January letter "does nothing to allay the concerns of the Claimant," and therefore "the Claimant can only restate its belief that serious irregularities have occurred at the company since the expropriation was carried out."<sup>214</sup>

---

<sup>209</sup> Letter from the Claimant, dated 14 January 2015, at para. 3(b).

<sup>210</sup> Letter from the Claimant, dated 14 January 2015, at para. 4.

<sup>211</sup> Letter from the Claimant, dated 14 January 2015, at para. 5.

<sup>212</sup> Letter from the Claimant, dated 14 January 2015, at para. 6.

<sup>213</sup> Letter from the Claimant, dated 14 January 2015, at para. 7.

<sup>214</sup> Letter from the Claimant, dated 14 January 2015, at para. 8. In its (unsolicited) response to the Claimant's 14 January 2015 letter, the Respondent reiterates its request that the Claimant's Request for Provisional Measures "be dismissed with costs" and states that the Claimant "has not raised any new submission, and simply seeks to regurgitate its earlier submissions" which the Respondent "has already responded to ... in its earlier correspondence and submissions ...." Letter from the Respondent, dated 20 January 2015, at paras. 2, 7. The Respondent also notes that: (1) any alarm raised by the Claimant with respect to the change of ownership of OTML shares is "misplaced" given that "it remains undisputed that the OTML shares are to be held for the benefit of the people of PNG, particularly those of the Western Province;" (2) "[w]here the Claimant itself accepts that monetary compensation

Decision on the Claimant's Request for Provisional Measures

**VI. THE TRIBUNAL'S REASONS**

*A. The Tribunal's Power to Grant Provisional Measures and Applicable Standard*

99. The Tribunal's authority to grant provisional measures in this ICSID proceeding is governed by Article 47 of the ICSID Convention. Article 47 of the Convention provides:

*Except as the parties otherwise agree, the Tribunal may, if it considers that the circumstances so require, recommend any provisional measures which should be taken to preserve the respective rights of either party.*

100. In turn, ICSID Arbitration Rule 39 provides that:

- (1) At any time after the institution of the proceeding, a party may request that provisional measures for the preservation of its rights be recommended by the Tribunal. The request shall specify the rights to be preserved, the measures the recommendation of which is requested, and the circumstances that require such measures.*
- (2) The Tribunal shall give priority to the consideration of a request made pursuant to paragraph (1).*
- (3) The Tribunal may also recommend provisional measures on its own initiative or recommend measures other than those specified in a request. It may at any time modify or revoke its recommendations.*
- (4) The Tribunal shall only recommend provisional measures, or modify or revoke its recommendations, after giving each party an opportunity of presenting its observations.*
- (5) If a party makes a request pursuant to paragraph (1) before the constitution of the Tribunal, the Secretary-General shall, on the application of either party, fix time limits for the parties to present observations on the request, so that the request and observations may be considered by the Tribunal promptly upon its constitution.*

---

would be an adequate remedy by claiming for monetary compensation as its final relief, the Claimant cannot possibly assert that the integrity of an ICSID arbitration would be threatened if its Request [for Provisional Measures] were not granted;" (3) "the constant changing of the basis of the [Claimant's] Request [for Provisional Measures] every time the Claimant's assertions are demonstrated to be false / misleading / selective itself suggests that the Request is unmeritorious;" and (4) the Claimant's change of focus from OTML's 2014 financial position to that in 2013 "is yet another illustration of the selective approach the Claimant is taking in its Request [for Provisional Measures], and demonstrates the hopelessness of the Request." Letter from the Respondent, dated 20 January 2015, at paras. 2-6 (emphasis omitted).

Decision on the Claimant's Request for Provisional Measures

- (6) *Nothing in this Rule shall prevent the parties, provided that they have so stipulated in the agreement recording their consent, from requesting any judicial or other authority to order provisional measures, prior to or after the institution of the proceeding, for the preservation of their respective rights and interests.*

101. These provisions of the Convention and the ICSID Arbitration Rules are the basis for the Tribunal's authority to order provisional measures, and define the circumstances in which such authority should be exercised.

1. Tribunal's Power to Recommend Provisional Measures

102. Despite the use of the term "recommend" in Article 47 of the ICSID Convention, this provision of the Convention has properly been understood as allowing the Tribunal to *order* provisional measures.<sup>215</sup> The phrase "recommend," in the context of the Convention, means "order" or "direct." An arbitral tribunal constituted under the ICSID Convention has the power not merely to propose or urge provisional measures, but also to issue orders mandating that such measures be taken.

103. The Tribunal has broad authority to order particular provisional measures under Article 47 of the ICSID Convention. However, this power must be exercised in a manner consistent with the general purposes and character of the provisional measures. Those purposes and character include, in particular, the exceptional nature of relief granted before the parties have had the opportunity fully to present their respective cases. In the words of the ICSID tribunal in *Maffezini v. Spain*, provisional relief is "an extraordinary measure which should not be granted lightly by the Arbitral Tribunal."<sup>216</sup>

---

<sup>215</sup> See, e.g., *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* (ICSID Case No. ARB/06/11), Decision on Provisional Measures, dated 17 August 2007, at para. 58, **Exhibit RL-29**.

<sup>216</sup> *Emilio Agustín Maffezini v. The Kingdom of Spain* (ICSID Case No. ARB/97/7), Decision on Provisional Measures (Procedural Order No. 2), dated 28 October 1999, at para. 10 (cited in Schreuer *et al*, *The ICSID Convention: A Commentary*, CUP (2nd ed., 2009), at p. 776, para. 64, **Exhibit CL-19**).

Decision on the Claimant's Request for Provisional Measures

104. It is nevertheless uncontested that the Tribunal may decide on provisional measures before having decided on the jurisdictional objections raised in this proceeding.<sup>217</sup> A decision on a request for provisional measures naturally does not impede the tribunal's determination of, or otherwise pre-judge, the issues of jurisdiction pending before a tribunal. As noted below, a tribunal's finding that it has *prima facie* jurisdiction for the purposes of a decision on provisional measures is without prejudice to the final determination on the issue of jurisdiction.
105. The types of provisional measures that may be granted by an ICSID tribunal include a wide range of measures, which depend on the particular circumstances of the case and the rights that are sought to be protected.<sup>218</sup> Measures that are commonly sought include orders for the preservation of the *status quo*, orders directing performance of a contract or other legal obligations, orders for the preservation of evidence, enforcement of confidentiality obligations, and orders for security for costs.<sup>219</sup>
106. In this case, the Claimant seeks three categories of measures directed at the Respondent – *i.e.*, that the Tribunal order the Respondent to refrain from, pending final determination of the dispute:
- a. “taking (or threatening to take) any further steps under Section 6 of the Tenth Supplemental Act, or otherwise interfering with or impeding the Claimant's lawful operation in PNG in accordance with the Program Rules” (“***Claimant's Request No. 1***”);
  - b. “harassing, arresting, or commencing any criminal prosecution against any officer, employee, servant or agent of the Claimant in connection with the performance of their responsibilities or functions as officers, employees, servants

---

<sup>217</sup> See, e.g., Schreuer *et al*, *The ICSID Convention: A Commentary*, CUP (2nd ed., 2009), at p. 771, para. 46, **Exhibit CL-19**.

<sup>218</sup> Schreuer *et al*, *The ICSID Convention: A Commentary*, CUP (2nd ed., 2009), at p. 779, para. 76.

<sup>219</sup> See, e.g., Born, *International Commercial Arbitration*, Kluwer (2nd ed., 2014), at pp. 2511-2540. See also Schreuer *et al*, *The ICSID Convention: A Commentary*, CUP (2nd ed., 2009), at p. 776, para. 76, **Exhibit CL-19**.

Decision on the Claimant's Request for Provisional Measures

or agents of the Claimant (or making any further threats to do so)" ("**Claimant's Request No. 2**"); and

- c. "taking any further steps that may aggravate the dispute, disturb the *status quo* as at the date of this Request, or otherwise impede the orderly resolution of the dispute in accordance with the ICSID Convention."<sup>220</sup> ("**Claimant's Request No. 3**").

2. Standard for Granting Provisional Measures

107. The requirements that must be satisfied for an order of provisional measures under Article 47 are well-settled, and are not materially in dispute between the Parties in this case (save for the requirement of urgency).<sup>221</sup>
108. According to one leading authority on the ICSID Convention, "it is clear that provisional measures will only be appropriate where a question cannot await the outcome of the award on the merits."<sup>222</sup> As the same commentator summarized, ICSID tribunals typically "will only grant provisional measures if they are found to be necessary, urgent and are required in order to avoid irreparable harm."<sup>223</sup> It is well-established<sup>224</sup> that the requesting party has the burden of showing why the requested provisional measures are necessary and should be ordered by the Tribunal.<sup>225</sup> In addition, tribunals commonly hold that a decision on provisional measures cannot pre-judge the merits of the case.
109. In particular, the party requesting provisional measures must demonstrate that, if the requested measures are not granted, there is a material risk of serious or irreparable

---

<sup>220</sup> Claimant's Request for Provisional Measures, at para. 27.

<sup>221</sup> See above at paras. 44-46, 50-51, 58-67, 70-77.

<sup>222</sup> Schreuer *et al*, *The ICSID Convention: A Commentary*, CUP (2nd ed., 2009), at p. 775, para. 63 (footnote omitted), **Exhibit CL-19** (quoted with approval in, e.g., *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Procedural Order No. 1, dated 31 March 2006, at para. 68, **Exhibit CA-12**).

<sup>223</sup> Schreuer *et al*, *The ICSID Convention: A Commentary*, CUP (2nd ed., 2009), at p. 776, para. 64, **Exhibit CL-19**.

<sup>224</sup> See, e.g., Schreuer *et al*, *The ICSID Convention: A Commentary*, CUP (2nd ed., 2009), at p. 776, para. 64, **Exhibit CL-19**.

<sup>225</sup> See Claimant's Request for Provisional Measures, at para. 13; Respondent's Observations, at para. 2. See above at paras. 44, 51.

Decision on the Claimant's Request for Provisional Measures

injury. There are variations in approach or the precise wording used by the ICSID tribunals as to whether this requirement is that of “irreparable” harm, or whether a demonstration of “serious” harm will suffice. In the Tribunal’s view, the term “irreparable” harm is properly understood as requiring a showing of a material risk of serious or grave damage to the requesting party, and not harm that is literally “irreparable” in what is sometimes regarded as the narrow common law sense of the term. The degree of “gravity” or “seriousness” of harm that is necessary for an order of provisional relief cannot be specified with precision, and depends in part on the circumstances of the case, the nature of the relief requested and the relative harm to be suffered by each party; suffice it to say that substantial, serious harm, even if not irreparable, is generally sufficient to satisfy this element of the standard for granting provisional measures.

110. Thus, in *Perenco Ecuador Ltd. v. Ecuador*, the tribunal stated that the ICSID Convention “does not lay down a test of irreparable loss and the authorities do not warrant so narrow a construction.”<sup>226</sup> That tribunal therefore reasoned that: “[i]f Perenco’s business in Ecuador were effectively brought to an end in this way [by seizure of its assets], such injury could not, in the Tribunal’s judgment, be adequately compensated by an award of damages should its claim ultimately be upheld.”<sup>227</sup>
111. The Tribunal is also of the view that the requesting party need not prove that “serious” harm is certain to occur. Rather, it is generally sufficient to show that there is a material risk that it will occur. The requirement of showing material risk does not, however, imply a showing of any particular percentage of likelihood, or probability, that the risk will materialize. The proper requirement is that the requesting party must establish the existence of a sufficient risk or threat that grave or serious harm will occur if provisional measures are not granted.

---

<sup>226</sup> *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/08/6), Decision on Provisional Measures, 8 May 2009, at para. 43, **Exhibit CA-6**.

<sup>227</sup> *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/08/6), Decision on Provisional Measures, 8 May 2009, at para. 46, **Exhibit CA-6**.

Decision on the Claimant's Request for Provisional Measures

112. Of course, the harm alleged by the requesting party must not be purely hypothetical or theoretical. As the tribunal in *Occidental* rightly noted:

*Provisional measures are not meant to protect against any potential or hypothetical harm susceptible to result from uncertain actions. Rather, they are meant to protect the requesting party from imminent harm.*<sup>228</sup>

113. In this regard, in deciding whether to grant provisional measures, tribunals also generally look to the nature of the provisional measures that are requested, and the relative injury to be suffered by each party. While some provisional measures (such as, for example, preserving the *status quo* and ordering performance of a contract or other legal obligation) typically require a strong showing of serious injury, urgency and a *prima facie* case, other provisional measures (such as preservation of evidence, enforcement of confidentiality obligations) are often unlikely to demand the same showings.

114. The requirements of necessity and urgency are also well-established. Although these requirements are not set out in express terms in the ICSID Convention, it is well-established that an order of provisional measures will only be granted if these measures are necessary to preserve the requesting party's rights, and are urgently required to avoid serious harm. In the words of the tribunal in *City Oriente v. Ecuador*, provisional measures may only be ordered "if their adoption is necessary to preserve the rights of the parties and guarantee that the award will fulfill its purpose of providing effective judicial protection."<sup>229</sup> In this regard, the Tribunal agrees with the *Burlington v. Ecuador* tribunal that the requirement of "necessity" means that the requested provisional measures "must be required to avoid harm or prejudice being inflicted upon the applicant."<sup>230</sup>

---

<sup>228</sup> *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* (ICSID Case No. ARB/06/11), Decision on Provisional Measures, dated 17 August 2007, at para. 89, **Exhibit RL-29**.

<sup>229</sup> *City Oriente Limited v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/06/21), Decision on Provisional Measures, dated 19 November 2007, at para. 52, **Exhibit CA-13**.

<sup>230</sup> *Burlington Resources Inc. and others v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/08/5), Procedural Order No. 1 on Burlington Oriente's Request for Provisional Measures, dated 29 June 2009, at para. 75, **Exhibit CA-15**.

Decision on the Claimant's Request for Provisional Measures

115. Moreover, as the Respondent rightly notes,<sup>231</sup> there is a wealth of authority concluding that an implicit requirement of urgency must be read into Article 47 of the ICSID Convention. Indeed, the very concept of interim or provisional relief necessarily requires a showing of some measure of urgency; absent urgency, there is no justification for a tribunal issuing mandatory orders before having heard the parties' full submissions and evidence.
116. In the Tribunal's view, a request for provisional measures will satisfy the requirement of urgency where it entails "a question [that] cannot await the outcome of the award on the merits."<sup>232</sup> As noted above, the precise degree of urgency required in each case will again depend on the provisional measures sought, and on the balance of harms that would result if the risk of harm were to materialize. In the words of the tribunal in *Biwater Gauff v. Tanzania*:

*the degree of 'urgency' which is required depends on the circumstances, including the requested provisional measures, and may be satisfied where a party can prove that there is a need to obtain the requested measure at a certain point in the procedure before the issuance of an award. In most situations, this will equate to 'urgency' in the traditional sense (i.e. a need for a measure in a short space of time). In some cases, however, the only time constraint is that the measure be granted before an award – even if the grant is to be some time hence. The Arbitral Tribunal also considers that the level of urgency required depends on the type of measure which is requested.*<sup>233</sup>

117. Thus, contrary to the Respondent's assertions,<sup>234</sup> the mere passage of time between the Request for Arbitration and the Request for Provisional Measures will not *per se* be conclusory that there is no urgency. The Tribunal will assess urgency taking into account the entirety of the circumstances of the case, and will take into account both the seriousness of the harm and the balance of injuries that would be suffered by both parties if provisional measures are (or are not) ordered.

---

<sup>231</sup> See above at paras. 51, 58-62.

<sup>232</sup> Schreuer *et al*, *The ICSID Convention: A Commentary*, CUP (2nd ed., 2009), at p. 775, para. 63, **Exhibit CL-19**.

<sup>233</sup> *Biwater Gauff (Tanzania) Ltd. v. United Republic of Tanzania* (ICSID Case No. ARB/05/22), Procedural Order No. 1, dated 31 March 2006, at para. 76, **Exhibit CA-12**.

<sup>234</sup> See above at para. 61.

Decision on the Claimant's Request for Provisional Measures

118. The Parties agree,<sup>235</sup> and the Tribunal concurs, that in order to succeed in obtaining provisional measures, the requesting party must show that the Tribunal has *prima facie* jurisdiction. The tribunal in *Occidental* explained this clearly, holding that “[w]hilst the Tribunal need not definitely satisfy itself that it has jurisdiction in respect of the merits of the case at issue for purposes of ruling upon the requested provisional measures, it will not order such measures unless there is, *prima facie*, a basis upon which the Tribunal’s jurisdiction might be established.”<sup>236</sup>
119. The fact of registration of the Request for Arbitration alone is not sufficient to establish *prima facie* jurisdiction for the purposes of the provisional measures application under Article 47 of the ICSID Convention. The Tribunal agrees with the *Perenco* tribunal, which concluded that the fact of registration of the Request for Arbitration is “not enough for the Tribunal,”<sup>237</sup> and the tribunal must itself be satisfied that there is a *prima facie* basis for jurisdiction. As Professor Schreuer notes in his commentary on the ICSID Convention, “[i]t is ultimately with the tribunal whether it will accept the Secretary-General’s registration as a sufficient basis or whether it wants to form a *prima facie* opinion on jurisdiction before recommending provisional measures.”<sup>238</sup> Deciding otherwise would effectively mean depriving the Tribunal of the power to determine whether it has jurisdiction, albeit on a *prima facie* basis for the purposes of a provisional measures application, and limit the analysis to the high level review that the ICSID Secretariat conducts at the registration stage. The determination of the *prima facie* jurisdiction for provisional measures is a somewhat higher threshold than that to be applied at the registration stage, although it of course also falls short of a final decision on jurisdiction.

---

<sup>235</sup> See above at paras. 44, 51.

<sup>236</sup> *Occidental Petroleum Corporation and, Occidental Exploration and Production Company v. The Republic of Ecuador* (ICSID Case No. ARB/06/11), Decision on Provisional Measures, dated 17 August 2007, at para. 55, **Exhibit RL-29**.

<sup>237</sup> *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador (Petroecuador)* (ICSID Case No. ARB/08/6), Decision on Provisional Measures, 8 May 2009, at para. 39, **Exhibit CA-6**.

<sup>238</sup> Schreuer *et al*, *The ICSID Convention: A Commentary*, CUP (2nd ed., 2009), at p. 772, para. 48 (footnote omitted), **Exhibit CL-19**.

Decision on the Claimant's Request for Provisional Measures

120. The requesting party must also show that there is a *prima facie* case on the merits of its claims. Although a tribunal should engage in a consideration of the *prima facie* strength of the parties' respective claims, counter-claims and defenses, that analysis should not pre-judge the merits of the case (as explained below<sup>239</sup>). In practice, the requirement to demonstrate the *prima facie* success on the merits will ordinarily lead to a rejection of a request for provisional measures only in rare circumstances, where the requesting party has failed to advance any credible basis for its claims.
121. Granting a request for provisional measures must not involve the tribunal pre-judging the merits of the case. It is essential, in this regard, that a tribunal not pre-judge, either consciously or unconsciously, the resolution of any aspect of the parties' respective claims and defenses. The Respondent also correctly refers to this rule as "the principle that an arbitral tribunal cannot grant a decision on the merits under the guise of interim relief."<sup>240</sup> This requirement means that an order recommending provisional measures must not preclude the tribunal from ultimately deciding the issues in the arbitration in any particular way after the parties have fully presented their cases on disputed substantive issues (such as jurisdiction or the merits of the claims).
122. The assessment of whether the above requirements are satisfied, and in particular whether there is a material risk of serious or irreparable harm, and whether the requested measures are urgent and necessary to prevent that harm from occurring, must be made in light of the circumstances of the case, and particularly the likelihood that the injury will occur during the pendency of the arbitration. As noted above, when assessing whether the requirements of showing serious harm, urgency and necessity are satisfied, the tribunal should also consider the respective hardships that either party would be subjected to if the provisional measures are granted.
123. Thus, provisional measures would ordinarily be available where the claimant, asserting a *prima facie* credible claim, proves that they are necessary and urgently required to avoid

---

<sup>239</sup> See below at paras. 124, 133, 163.

<sup>240</sup> Respondent's Observations, para. 1 at fn. 1 (emphasis omitted).

Decision on the Claimant's Request for Provisional Measures

serious injury that is likely to result from the actions threatened by the respondent that would alter the existing *status quo*. That is particularly true where the respondent would not suffer material harm from a grant of provisional measures to the claimant under the circumstances.

*B. The Claimant's Requested Provisional Measures*

124. Without pre-judging any of the issues in this case that are to be finally determined at a later stage in this proceeding, the Tribunal considers that the “threshold requirements”<sup>241</sup> – *i.e.*, that there is *prima facie* jurisdiction and *prima facie* case on the merits – are satisfied in this case. This conclusion does not pre-judge the merits of the Respondent's jurisdictional objections or the Claimant's claims in any way, which remain subject to the Tribunal's disposition on the basis of the evidence and argument submitted by the parties in the course of the arbitration.
125. For the same reasons discussed in the Tribunal's Decision on the Respondent's Objections under Rule 41(5) of the ICSID Arbitration Rules, the Tribunal considers that the Claimant has satisfactorily demonstrated a *prima facie* case on both jurisdiction and the merits of its claims. There are of course serious counter-arguments – both jurisdictional and otherwise – to the Claimant's claims. But, for present purposes, the Claimant has satisfied the relatively undemanding requirements of a *prima facie* case.
126. Bearing this in mind, the Tribunal discusses each of the Claimant's Requests for Provisional Measures below.

1. Claimant's Request No. 1

127. In its Request No. 1, the Claimant seeks an order directing the Respondent to refrain from “taking (or threatening to take) any further steps under Section 6 of the Tenth Supplemental Act, or otherwise interfering with or impeding the Claimant's lawful

---

<sup>241</sup> Expression used by the Respondent. *See above* at paras. 49-58; Respondent's Observations, at para. 4 and Section III.

Decision on the Claimant's Request for Provisional Measures

operation in PNG in accordance with the Program Rules.” This request is for injunctive relief to restrain the Respondent from altering the *status quo* with respect to the Claimant's operations, in particular in respect of the Claimant's management structure. The Claimant argues, in particular, that this provisional relief is necessary because “the Respondent's long-arm attempts to replace the management of [the Claimant] are clearly acts of aggravation as they are exacerbating this dispute and making the just resolution of it significantly more difficult” and “[t]hey also pose a direct threat to the Claimant's ability to continue operating and to pursue its claims.”<sup>242</sup>

128. As noted above, Section 6 of the Tenth Supplemental Act purports to give the Respondent the power to restructure the Claimant:

*Notwithstanding anything to the contrary in any Act, the State has all necessary powers to restructure PNGSDP and its operations to ensure that PNGSDP applies its funds for the exclusive benefit of the people of the Western Province.*<sup>243</sup>

129. The Tribunal notes that, among the measures that the Respondent has sought to exercise on the basis of Section 6 of the Tenth Supplemental Act, the Respondent purported (by letter dated 24 October 2013) to terminate all Board members of the Claimant and replace them with a “Transitional Management Team” appointed by the Respondent.<sup>244</sup> Furthermore, Mr David Sode, the Claimant's Managing Director, received a letter from the Prime Minister of PNG, stating that his appointment was terminated.<sup>245</sup> The Tribunal understands, however, that the “Transitional Management Team” in fact “never took its position, and it is Sir Mekere (and his allies) who remain in complete control of the Claimant.”<sup>246</sup>

130. In the Tribunal's view, these facts demonstrate that the Respondent had already attempted to replace the Claimant's management. In turn, that indicates, in the Tribunal's

---

<sup>242</sup> Request for Provisional Measures, at para. 9; *see above* at para. 42(c).

<sup>243</sup> Request for Arbitration, at para. 40 (emphasis added).

<sup>244</sup> 1st Sir Mekere Morauta WS, at para. 127. *See above* at paras. 38(a), 71(c).

<sup>245</sup> 1st Sir Mekere Morauta WS, at para. 128.

<sup>246</sup> *See above* at para. 65 and fn. 100; Respondent's Observations, at para. 44.

Decision on the Claimant's Request for Provisional Measures

view, that there is a real risk that the Respondent may undertake to implement or give effect to this measure or undertake further measures with the same purpose of depriving the current management of the control over the Claimant. The Tenth Supplemental Act remains in full force and effect and there is no indication that the Respondent's views regarding the Claimant and its assets and management have altered since October 2013. The likelihood of further actions by the Respondent, along similar lines, is in the Tribunal's view likely to materialize before the end of this proceeding, and therefore it is a question that "cannot await the outcome of the award on the merits."<sup>247</sup>

131. The Tribunal also finds that there is a risk of grave or serious harm to the Claimant during the pendency of the arbitration, because the evidence shows that the Respondent will likely undertake further actions to take over control and operations of the Claimant, including by seeking to remove and replace the Claimant's management, as it already purported to do by appointing the "Transitional Management Team." Such a restructuring of the corporate management of the Claimant would likely cause serious damage to the Claimant, including by endangering its very existence and affecting its ability to participate as a party in this arbitration. Among other things, a restructured management could abandon (or alter) the Claimant's position in these proceedings or the Singapore court proceedings, or could dispose of or encumber the Claimant's assets, or conclude agreements with the Respondent or other parties that would be potentially adverse to the Claimant's interests as asserted in this arbitration.
132. Given the foregoing, the Tribunal considers that an order of provisional relief directed at interference with or changes to the Claimant's management is necessary in order to prevent this harm from occurring during the pendency of these proceedings. The Tribunal does not, at present, consider that a sufficient showing has been made with regard to more generalized actions by the Respondent assertedly affecting the *status quo*. If the Respondent were to undertake additional actions potentially causing grave harm to the Claimant, the Claimant would be able to seek further provisional relief from the Tribunal.

---

<sup>247</sup> See above at paras. 108, 116.

Decision on the Claimant's Request for Provisional Measures

133. There is no risk that the Tribunal's order would pre-judge any of the issues in this case. In this respect, the Tribunal does not see how the Claimant's Provisional Measure 1 "offends the principle that an arbitral tribunal cannot grant a decision on the merits under the guise of interim relief."<sup>248</sup> In particular, the Tribunal's order would not in any way pre-judge the Claimant's claim that the Respondent has unlawfully expropriated the Claimant's investment in the PNG or the Respondent's jurisdictional objections. Rather, the Tribunal's order will allow the Claimant to continue its operations, under its current management, during the remainder of this proceeding, without fear of restructuring or other interference with its pre-existing corporate and management structure.
134. The Tribunal also considers that the requested measures are "urgent" under the applicable standard for provisional measures.<sup>249</sup> As indicated above, the Respondent has already taken steps to remove and replace the Claimant's management and there is no indication that it will unilaterally desist from such efforts in the immediate future. In the Tribunal's view, there is a material likelihood of further steps by the Respondent to remove or replace the Claimant's management during the remainder of this arbitration.
135. In addition, the balance of harms weighs in favor of granting the measure requested by the Claimant. If the provisional measure is not granted, there is a risk of serious harm to the Claimant. By contrast, the harm that would be suffered by the Respondent would be limited. In particular, there is no persuasive evidence that the harm that the Respondent would allegedly suffer if the Claimant's assets were dissipated by its management is likely to occur during this proceeding. If clear and convincing evidence of such dissipation of assets by the Claimant is discovered during the course of this proceeding, the Respondent would be free to request provisional measures from the Tribunal directed at the preservation of such assets.
136. In light of the foregoing, the Tribunal considers it appropriate and necessary to enjoin the Respondent from undertaking any further actions during this arbitration that would alter

---

<sup>248</sup> Respondent's Observations, para. 1 at fn. 1 (emphasis omitted).

<sup>249</sup> See *above* at paras. 107-108, 114-117.

Decision on the Claimant's Request for Provisional Measures

the corporate or management structure of the Claimant. The Tribunal therefore orders that:

***the Respondent refrain from taking any further steps under Section 6 of the Tenth Supplemental Act, or otherwise interfering with the Claimant's management. In particular, the Respondent should refrain from taking any measures purporting to restructure or otherwise alter the management of the Claimant.***

137. This order shall remain in effect unless and until it is revoked by the Tribunal or until the end of this arbitration proceeding.

2. Claimant's Request No. 2

138. In its Request No. 2, the Claimant requests an order directing the Respondent to refrain from "harassing, arresting, or commencing any criminal prosecution against any officer, employee, servant or agent of the Claimant in connection with the performance of their responsibilities or functions as officers, employees, servants or agents of the Claimant (or making any further threats to do so)."

139. The Tribunal finds that the Claimant has failed to demonstrate that the requested provisional measure is necessary to prevent imminent serious harm, or that the requested measure is urgent. In particular, the Claimant has not provided evidence – beyond Sir Mekere Morauta's professed "belie[f]"<sup>250</sup> – that the State "directed persons for whom it is responsible to make threats of physical harm to officers, employees and agents [of the Claimant], or at the very least failed to prevent these persons from making such threats."<sup>251</sup>

140. In particular, the Claimant has not provided sufficient evidence of actual harassment of or injury to the Claimant's employees by the Respondent, or of physical harm to the

---

<sup>250</sup> 1st Sir Mekere Morauta WS, at para. 142.

<sup>251</sup> 1st Sir Mekere Morauta WS, at para. 142.

Decision on the Claimant's Request for Provisional Measures

Claimant's employees. Nor has the Claimant provided satisfactory evidence, either direct or circumstantial, of threats of future harm or harassment by the Respondent, or evidence that any such harassment was done upon the Respondent's instructions, prompting or encouragement.<sup>252</sup> As such, this requested measure is not sufficiently substantiated by the factual evidence provided by the Claimant.

141. The Tribunal emphasizes, however, that provisional measures would generally be appropriate if there were credible evidence that either party had made, directed or encouraged threats of physical harm against employees, officers or agents of the other party. Such actions would be a serious breach of each party's obligation to arbitrate in good faith and would ordinarily warrant immediate relief.
142. The Claimant also has not satisfactorily established that Mr Davis' deportation was connected with the Parties' dispute, rather than Mr Davis' breach of the visa conditions, as the Respondent contends.<sup>253</sup> The Tribunal notes the timing of Mr Davis' deportation and accepts that it suggests a connection with these proceedings. However, standing alone, this indication is insufficient to warrant the substantial intrusion on the Respondent's governmental authority that would result from an order requiring revocation of Mr Davis' deportation. The Tribunal also notes that, in the event that there are concrete circumstances indicating that the presence of Mr Davis (or others) in PNG was necessary for purposes of preparing for these proceedings or otherwise conducting the Claimant's operations, provisional measures would in principle be available if such presence were not permitted by the Respondent.
143. In addition, like other ICSID tribunals, the Tribunal considers that requests for provisional measures should be denied where they are aimed at "prevent[ing] an action which [the Claimants] are not even sure is being planned,"<sup>254</sup> or where granting a

---

<sup>252</sup> See 1st Sir Mekere Morauta WS, at para. 143.

<sup>253</sup> See above at para. 66; 1st Sir Mekere Morauta WS, at para. 144.

<sup>254</sup> *Occidental Petroleum Corporation and Occidental Exploration and Production Company v. The Republic of Ecuador* (ICSID Case No. ARB/06/11), Decision on Provisional Measures, dated 17 August 2007, at para. 89, **Exhibit RL-29**.

Decision on the Claimant's Request for Provisional Measures

provisional measure involves “a degree of speculation” and where there is insufficient evidence before the tribunal that the risk would be likely to materialize.<sup>255</sup> Here, the establishment of a Commission of Inquiry, announced by the Respondent on or around 12 May 2014,<sup>256</sup> does not in itself entail that the Claimant's officers and/or employees would be subjected to harassment or any other inappropriate actions by the Respondent. There is no evidence, at least at this juncture, that the Commission of Inquiry would not perform its functions in a transparent and independent manner, unconnected to these proceedings. The Respondent is entitled to pursue its own fact finding inquiries into the circumstances of the Claimant's activities in the PNG and the mere establishment of a commission to do so cannot be regarded as improper or wrongful.

144. In addition, any alleged harassment or other harm arising from establishment of the Commission of Inquiry would be merely hypothetical at this stage, because the Commission of Inquiry has “not yet been constituted”<sup>257</sup> and hence the harm (if any) that could result from the activities of this Commission of Inquiry remains hypothetical and uncertain. As explained above, purely hypothetical harm cannot provide the basis for granting interim measures.<sup>258</sup> There is also no evidence that would suggest that, even if the Commission were to be established and were to take adverse actions, these actions would materialize during the pendency of this arbitration.
145. Furthermore, the Tribunal agrees with the tribunal in *Caratube International Oil Co. LLP v. Kazakhstan* that the State's investigative powers, including in criminal matters, are “a most obvious and undisputed part of [its] sovereign right ... to implement and enforce its national law on its territory” and “a particularly high threshold must be overcome before an ICSID Tribunal can indeed recommend provisional measures regarding criminal

---

<sup>255</sup> See, e.g., *Tanzania Electric Supply Company Limited v. Independent Power Tanzania Limited* (ICSID Case No. ARB/98/8), Decision on the Respondent's Request for Provisional Measures, dated 20 December 1999, at paras. 13-14, **Exhibit RL-33**.

<sup>256</sup> See above at paras. 71(c), 74(g); 1st Sir Mereke Morauta WS, at para. 148.

<sup>257</sup> 1st Daniel Rolpagarea WS, at para. 76(a).

<sup>258</sup> See above at para. 112.

Decision on the Claimant's Request for Provisional Measures

investigations conducted by a state.”<sup>259</sup> The ICSID tribunal's decision in *Lao Holdings* is to the same effect.<sup>260</sup> As explained above, there is insufficient evidence here of either actual or threatened harm, or of improper actions by the Respondent, sufficient to warrant interference with the Respondent's exercise of its lawful governmental functions.<sup>261</sup>

146. The Claimant argues that “threats by a host State to commence criminal proceedings against the claimant's officials justif[y] the recommendation of provisional measures,”<sup>262</sup> and that “[t]here is clearly a ‘strong linkage’” between the institution of the Commission of Inquiry and the investment dispute before the Tribunal.<sup>263</sup> Although there appears to be some connection with the facts that the Respondent has characterized as the dissipation of the Claimant's assets, which was part of the Respondent's justification for its recent actions *vis-à-vis* the Claimant, the Tribunal is unconvinced that there is a sufficiently “strong linkage” between the institution of the Commission of Inquiry and this proceeding. The Tribunal notes, in particular, that the second prong of the *Lao Holdings* tribunal that applied the “strong linkage” test is missing in this case – *i.e.*, that “such a situation [*i.e.*, concurrent pendency of criminal local proceedings and arbitration proceedings] threatens the integrity of the arbitral process.”<sup>264</sup>
147. The Claimant's Request No. 2 is therefore rejected. As indicated above, however, in the event of substantiated threats of physical or comparable harm to a party's employees, officers or agents, provisional measures to prevent such harm from occurring would be available.

---

<sup>259</sup> *Caratube International Oil Company LLP v. The Republic of Kazakhstan* (ICSID Case No. ARB/08/12), Decision Regarding Claimant's Application for Provisional Measures, dated 31 July 2009, at paras. 134-137, **Exhibit RL-24**.

<sup>260</sup> *See Lao Holdings N.V. v. The Lao People's Democratic Republic* (ICSID Case No. ARB(AF)/12/6), Ruling on Motion to Amend the Provisional Measures Order, dated 30 May 2014, at paras. 21-25, **Exhibit RL-28**.

<sup>261</sup> *See above* at paras. 139-142.

<sup>262</sup> Claimant's Reply, at para. 23 (emphasis omitted).

<sup>263</sup> *See above* at paras. 66, 74(g); Claimant's Reply, at para. 23.

<sup>264</sup> *Lao Holdings N.V. v. The Lao People's Democratic Republic* (ICSID Case No. ARB(AF)/12/6), Ruling on Motion to Amend the Provisional Measures Order, dated 30 May 2014, at para. 37, **Exhibit RL-28**.

Decision on the Claimant's Request for Provisional Measures

3. Claimant's Request No. 3

148. The Claimant's Request No. 3 relates to the preservation of the *status quo* and the non-aggravation of the dispute. Preliminarily, it appears from the Claimant's submissions that it makes one general request for the preservation of the *status quo*, as set out in paragraph 27(c) of the Claimant's Request for Provisional Measures, and also formulates (in its 23 December 2014 letter<sup>265</sup>) a more specific sub-request, within the broad request for the preservation of the *status quo*, relating to the ownership of OTML shares.<sup>266</sup>

149. The general Request No. 3 and the more specific sub-request relating to the ownership of OTML shares are discussed in turn below.

a) Claimant's general Request No. 3

150. In its Request No. 3, as articulated in paragraph 27(c) of the Request for Provisional Measures, the Claimant seeks an order from the Tribunal enjoining the Respondent from "taking any further steps that may aggravate the dispute, disturb the *status quo* as at the date of this Request, or otherwise impede the orderly resolution of the dispute in accordance with the ICSID Convention." As such, the Claimant's Request No. 3 is a request for a general order for the preservation of the *status quo* and non-aggravation of the dispute.

151. The Claimant's Request No. 3 is rejected, because the Claimant has not shown either urgency or the necessity for such an open-ended order. The Claimant's request for the preservation of the *status quo* and non-aggravation of the dispute, without requesting specific, clearly articulated measures, is overly broad, and, as such, will ordinarily fail to satisfy the requirements of urgency and necessity. Here, the breadth of the Claimant's request precludes the Tribunal from assessing the risk of serious harm that would be

---

<sup>265</sup> See above at paras. 85-88.

<sup>266</sup> See Letter from the Claimant, dated 23 December 2014, at para. 20 (requesting that, "***as a measure under paragraph 27(c) of the Claimant's Request for Provisional Measures***, the Tribunal move as soon as possible to order the State to refrain from transferring or issuing (or completing the transfer or issue of) any OTML shares to any third party, or taking any steps that otherwise change the ownership of OTML, pending determination of this dispute in accordance with the ICSID Convention") (emphasis added).

Decision on the Claimant's Request for Provisional Measures

likely absent such an order, or establishing whether there is necessity and urgency for such an order in light of that risk.

152. In addition, the Claimant has not articulated the character of the *status quo* that assertedly needs protection under this request. The broad category of measures “preserving the *status quo*” would therefore be extremely difficult to implement in practice, because any legislative measures, regulatory decisions or other actions could potentially be considered as an alteration of the *status quo* in this case. That is inconsistent with the purpose of the provisional measures or Article 47 of the ICSID Convention. Rather, requests for provisional measures must generally be narrow and specific, so that a tribunal, and the party defending the request for provisional measures, are able to clearly identify the measures, and ensure compliance therewith.
153. As the Respondent rightly points out, provisional measures are “exceptional” measures not to be taken lightly, particularly where they are ordered against a State. The Tribunal agrees with the tribunal in *CEMEX v. Venezuela* that the “so-called principle of non-aggravation cannot supplant the requirements of Article 47,” and that “‘non-aggravation measures’ are ancillary measures which cannot be recommended in the absence of measures of a purely protective or preservative kind.”<sup>267</sup>
154. The Claimant's general Request No. 3, as articulated in paragraph 27(c) of the Claimant's Request for Provisional Measures, must therefore be rejected.
- b) Claimant's request relating to the ownership of OTML shares as set out in the Claimant's 23 December 2014 letter
155. As noted above, in its 23 December letter, the Claimant formulated a more specific sub-request within the general order sought in paragraph 27(c) of the Request for Provisional Measures. In this specific sub-request, the Claimant seeks an order directing the Respondent to “order the [Respondent] to refrain from transferring or issuing (or

---

<sup>267</sup> *CEMEX Caracas Investments B.V. and CEMEX Caracas II Investments B.V. v. Bolivarian Republic of Venezuela* (ICSID Case No. ARB/08/15), Decision on the Claimant's Request for Provisional Measures, dated 3 March 2010, at paras. 61-65, **Exhibit RL-25**.

Decision on the Claimant's Request for Provisional Measures

completing the transfer or issue of) any OTML shares to any third party, or taking any steps that otherwise change the ownership of OTML, pending determination of this dispute in accordance with the ICSID Convention.”<sup>268</sup>

156. Unlike the Claimant's general Request No. 3, discussed above,<sup>269</sup> this more specific request satisfies the requirements of specificity, urgency and necessity.
157. First, unlike the Claimant's general Request No. 3, this sub-request is narrow and specific and clearly sets out the character of the *status quo* that the Claimant seeks to preserve (*i.e.*, the ownership of OTML shares).
158. Second, in the Tribunal's view, the circumstances described by the Claimant and evidence submitted by both Parties show that an urgent order is required. In particular, information provided by the Claimant regarding the imminent disposal of 33% of shares in OTML for the benefit of the People of the Western Province, including recent press articles reporting that this sale is about to materialize, is sufficient evidence of imminent harm.
159. In addition, the Claimant's evidence is confirmed by the Respondent's admissions in its 9 January 2015 letter. In its letter, the Respondent confirmed that “the State's National Executive Council had approved the free transfer of 33 percent ownership in OTML to the people of Western Province, following consultation with the stakeholders, including the landowners.”<sup>270</sup> The Respondent also referred to “further discussions” that will be carried out, followed by “a further decision [to be] made by the State as to how best to implement the Intended Share Transfer” and then the transfer itself.<sup>271</sup> Although the Respondent does not specify the timeframe for these next steps, there is little doubt that this question “cannot await the outcome of the award on the merits;” rather, it requires

---

<sup>268</sup> See above at para. 88.

<sup>269</sup> See above at paras. 150-154.

<sup>270</sup> See above at para. 90; Letter from the Respondent, dated 9 January 2015, at para. 4 (emphasis omitted).

<sup>271</sup> See above at para. 92; Letter from the Respondent, dated 9 January 2015, at para. 12 (emphasis omitted).

Decision on the Claimant's Request for Provisional Measures

urgent injunctive relief to restrain the Respondent from altering the ownership of the OTML shares.

160. Third, in the Tribunal's view, there is a material risk of serious harm to the Claimant, if the Tribunal does not issue an order. The above facts demonstrate that the Respondent has already expressed an intention to, and has in fact undertaken concrete actions in order to, alter the ownership of the shares in OTML. In turn, that indicates that there is a real risk that the Respondent: (a) will proceed to finalize the transfer of 33% of shares in OTML to third parties in the near future, while this arbitration is still pending; and (b) will likely undertake further actions to alter the ownership of the OTML shares, in a manner that would significantly affect the Tribunal's ability to render an award of restitution, as sought by the Claimant.
161. The mere fact that the transfer has not yet taken place does not make the risk of harm merely "speculative." Rather, the Respondent itself admitted that it had started taking steps towards the disposal of the OTML shares; therefore, contrary to the Respondent's assertions, this risk is not "premature and speculative."<sup>272</sup> The basic purpose of provisional measures is to prevent the harm from materializing; had the transfer already been completed, the provisional measure requested by the Claimant would be belated, and therefore of little use.
162. In the Tribunal's view, the transfer of the shares to third parties – that would potentially qualify as *bona fide* third party purchasers – would significantly undermine the opportunity for the Claimant to receive "reinstatement and return of its shares in OTML" which is the primary relief that the Claimant seeks in this arbitration.<sup>273</sup> In this regard, contrary to the Respondent's assertions, the Claimant is not required to show "irreparable" harm;<sup>274</sup> rather, as noted above, a showing of substantial, serious harm would generally suffice. In the Tribunal's view, such a showing has been made by the

---

<sup>272</sup> See *above* at para. 91; Letter from the Respondent, dated 9 January 2015, at para. 11.

<sup>273</sup> See Letter from the Claimant, dated 23 December 2014, at para. 8; Request for Provisional Measures, at para. 6.

<sup>274</sup> See *above* at para. 109; Letter from the Respondent, dated 9 January 2015, at para. 11.

Decision on the Claimant's Request for Provisional Measures

Claimant, and confirmed by the Respondent's admissions with regard to its intended transfer of OTML shares. The Tribunal therefore considers that an order of provisional relief is necessary to prevent this harm from occurring during the pendency of these proceedings.

163. Moreover, there is no risk that the Tribunal's order would pre-judge any of the issues in this case. An order directing the Respondent to refrain from altering the *status quo* with regard to the ownership of OTML shares would not in any way pre-judge any of the Claimant's claims; rather, it would allow the Tribunal to preserve its authority to decide on the merits of the case (should it determine it has jurisdiction), including to order restitutionary relief, if the Tribunal decides that such relief is appropriate in this arbitration.
164. In addition, the balance of harms also weighs in favor of granting the Claimant's requested measure for the preservation of the *status quo* with respect to ownership of OTML shares. The Respondent has not provided any reasons that would justify the need to urgently dispose of OTML's shares, nor has it explained the harm that the Respondent would suffer if the shares are not disposed of at this time. By contrast, the harm that is likely to result for the Claimant will be serious, and potentially irreparable. Therefore, the need to protect the Claimant's rights – and preserve the Tribunal's authority to decide on the merits of this case and grant relief that it considers appropriate – outweighs the considerations that could warrant the disposal of shares in OTML by the Respondent before the Tribunal's final award in this arbitration.
165. In light of the foregoing, the Tribunal considers it appropriate and necessary to enjoin the Respondent from undertaking any actions during this arbitration that would alter the *status quo* with respect to the ownership of the shares in OTML. The Tribunal therefore orders that:

Decision on the Claimant's Request for Provisional Measures

***the Respondent refrain from transferring or issuing (or completing the transfer or issue of) any OTML shares to any third party, or taking any steps that otherwise change the ownership of OTML.***

166. This order shall remain in effect unless and until it is revoked by the Tribunal or until the end of this arbitration proceeding.

*C. Relevance of the Singapore Court Proceedings*

167. The Parties disagree about the relevance of the Singapore court proceedings for the Tribunal's decision on provisional measures in this case. In particular, the Respondent has alleged that "given the Claimant's failure (on non-jurisdictional grounds) to obtain the self-same provisional measures in the Singapore Courts, the Singapore Court's finding that those measures are not urgent/necessary ... ought, in the absence of any changed circumstances (and there is none, as the Claimant itself recognises), to preclude the Claimant from seeking a further bite of the 'provisional apple'."<sup>275</sup>

168. In this case, the Tribunal sees no scope for application of the preclusion principle referred to by the Respondent. The relief that the Claimant sought before the Singapore court was related to issues of the Singapore company law.<sup>276</sup> By contrast, in this arbitration, the Claimant seeks injunctive relief against the Respondent, a sovereign State, under the relevant principles of international law, which the Singapore Court was not requested (and might well not have the authority) to grant.<sup>277</sup> Thus, there can be no preclusive effect of the Singapore Court decision rejecting the Claimant's requested interim relief, because the measure requested and the basis for the requested measure was different.

169. In this regard, the Tribunal notes that it is not determinative that "the[] same facts were relied upon by the Claimant in its unsuccessful attempt to obtain similar reliefs in

---

<sup>275</sup> Respondent's Observations, at para. 25 (citing Born, *International Commercial Arbitration*, Kluwer (2nd ed., 2014), at pp. 3787-3790, **Exhibit RL-36**).

<sup>276</sup> See Claimant's Reply, at paras. 26 *et seq.*

<sup>277</sup> See *above* at para. 75(a).

Decision on the Claimant's Request for Provisional Measures

Summons 5547”<sup>278</sup> before the Singapore Court. Rather, the character of the relief requested and the legal standard and basis for that request must also be substantially similar.

170. Conversely, the Tribunal's analysis is not altered by the Singapore Court's injunction that the Claimant refrain from “effecting any further changes to its M&A and to the composition of its Board,” which, in any event, the Tribunal understands is a temporary, “holding order,” pending the conclusion of the hearing of the injunction application.<sup>279</sup>

## **VII. THE TRIBUNAL'S DECISION**

171. For the above reasons, the Tribunal hereby:

- a. orders that, for the duration of these arbitration proceedings, the Respondent refrain from taking any further steps under Section 6 of the Tenth Supplemental Act, or otherwise interfering with the Claimant's management. In particular, the Respondent should refrain from taking any measures purporting to restructure or otherwise alter the management of the Claimant, for the reasons set out above.<sup>280</sup> The remainder of the Claimant's Request No. 1 is rejected.
- b. rejects the Claimant's Request No. 2, for the reasons set out above.<sup>281</sup>
- c. rejects the Claimant's general Request No. 3 as articulated in paragraph 27(c) of the Claimant's Request for Provisional Measures, for the reasons set out above.<sup>282</sup>
- d. grants the Claimant's sub-request set out in its 23 December 2014 letter, relating to the preservation of the *status quo* with respect to the ownership of shares in OTML, and orders that, for the duration of these arbitration proceedings, the

---

<sup>278</sup> Respondent's Observations, at para. 35(a) fn. 44 (emphasis omitted). *See also* Respondent's Observations, at para. 35(b) fn. 45.

<sup>279</sup> *See above* at para. 75(b).

<sup>280</sup> *See above* at paras. 127-137.

<sup>281</sup> *See above* at paras. 138-147.

<sup>282</sup> *See above* at paras. 150-154.

Decision on the Claimant's Request for Provisional Measures

Respondent refrain from transferring or issuing (or completing the transfer or issue of) any OTML shares to any third party, or taking any steps that otherwise change the ownership of OTML.<sup>283</sup>

- e. reserves the decision on costs associated with the Request for Provisional Measures.
172. The above orders shall remain in effect unless and until they are revoked by the Tribunal or until the end of this arbitration proceeding. These orders are made strictly without prejudice to the Tribunal's decision on the merits of the issues in dispute in this arbitration. Nothing in this decision may be understood as pre-judging the outcome of any of the issues in dispute in this case, including whether the Tribunal has jurisdiction over the Claimant's claims.

[Signed]

\_\_\_\_\_  
Gary Born, President

[Signed]

\_\_\_\_\_  
Michael Pryles

[Signed]

\_\_\_\_\_  
Duncan Kerr

Date: 21 January 2015

---

<sup>283</sup> See above at paras. 155-166.